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Criminal Procedure

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CRIMINAL PROCEDURE

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I. Introduction

Due to the plethora of recent developments in the field of criminal procedure, this survey does not purport to be exhaustive in scope. It is necessarily selective and is complemented by other articles, notes, and surveys relating to criminal procedure issues.[1] For the same reason, it was not possible to consider legislative developments.[2] Instead, the survey focuses on the case law. Since criminal procedure is "constitutionalized" to a large extent, significant recent holdings of the United States Supreme Court as well as of the Montana Supreme Court are considered.

II. Confessions and Admissions

A. *Introduction*

This portion of the survey will examine five Montana decisions[3] and one United States Supreme Court decision[4] which consider the constitutional validity of confessions. Questions regarding confessions generally arise within the context of suppression hearings. These issues come before the Montana Supreme Court or the United States Supreme Court as part of an appeal from a lower court decision either granting or denying a motion to suppress. The state has a statutory right of appeal from an order suppressing a confession, admission, or other evidence.[5] A defendant, on the other hand, may only appeal from an order denying his motion to suppress after final judgment has been entered.[6] The primary focus of these appeals is whether the confession or admission is admissible into evidence or, conversely, whether it should be excluded.

There are essentially five different tests of admissibility of confessions in Montana and a confession must pass each of them before it may be admitted into evidence. First, it must be "volun-

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1. Ranney, *Presumptions in Criminal Cases: A New Look at an Old Problem*, 41 Mont. L. Rev. 21 (1980); Civil Procedure and Evidence Survey, 41 Mont. L. Rev. 293 (1980) (polygraph evidence; corroboration of accomplice testimony; other crimes evidence); Note, 41 Mont. L. Rev. 281 (1980) (probable cause for issuance of search warrant).

2. Foremost among the legislative developments was the Montana Legislature's abolition of the insanity defense. A consideration of the legislative changes, their validity and effect, is beyond the scope of a survey of recent case law developments. The topic is deserving of separate consideration.

3. State v. Allies, ___ Mont. ___, 606 P.2d 1043 (1979); State v. Blakney, ___ Mont. ___, 605 P.2d 1093 (1979); State v. Dess, ___ Mont. ___, 602 P.2d 142 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198 (1979); State v. Ryan, ___ Mont. ___, 595 P.2d 1146 (1979).

4. Dunaway v. New York, ___ U.S. ___, 99 S. Ct. 2248 (1979).

5. Montana Code Annotated [hereinafter cited as MCA] § 46-20-103 (1979).

6. MCA § 46-20-104 (1979).

tary" in the legal sense of the word.[7] Secondly, it may not violate the requirements of *Miranda v. Arizona*[8] and its progeny. Thirdly, the confession may not be a result of an unnecessary delay in presenting an accused before an examining magistrate.[9] Fourthly, the confession may not be the fruit of other illegal police procedure.[10] And finally, there must be some proof that an offense was committed other than the confession itself.[11] This section of the survey will examine the test of voluntariness in Montana with some specificity and the other tests of admissibility to the extent that developments have occurred within the period covered by the survey. It will also examine the rules governing the presentation of evidence in a suppression hearing and the scope of review in light of recent Montana decisions and relevant decisions of the United States Supreme Court.

B. *Voluntariness—Totality of the Circumstances*

1. *Voluntary—A Term of Art*

Voluntariness is frequently stated to be "the underlying test of

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7. *See* notes 12 through 120 *infra* and accompanying text.

8. 384 U.S. 436 (1966).

9. In State v. Benbo, 174 Mont. 252, 570 P.2d 894 (1977), Montana adopted the equivalent of the federal *McNabb-Mallory* rule *(see* McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957)). The rule in Montana is based upon MCA § 46-7-101 (1979), which requires that an arrested person be presented without unnecessary delay before a judge for his initial appearance, and MCA § 46-7-102 (1979), which sets forth the duties of the judge at the initial appearance. The Montana rule was outlined in *Benbo* as follows:

> Henceforth, the effect of a failure to take a person before a judge without unnecessary delay after his arrest is to be determined as follows: When a defendant bases a motion to suppress evidence upon a claim that he was not provided a prompt initial appearance, the burden is first on the defendant to show the delay was unnecessary. The district court should focus on the diligence of the persons who made the arrest in bringing the defendant before the nearest and most accessible judge. While the length of the time between arrest and initial appearance is not determinative of the "necessity" of the delay, it is a factor to be considered.
>
> Once a defendant has established the delay was unnecessary, the burden shifts to the prosecution. The state must show the evidence obtained during the delay was not reasonably related to the delay. Absent such a showing the evidence will be excluded.

174 Mont. at 262, 570 P.2d at 900. There are no cases within the period of this survey which deal with this particular rule of admissibility. It will not, therefore, receive any further discussion.

10. *See* notes 142 through 144 *infra* and accompanying text.

11. This is the so-called corpus delicti rule. There are no decisions under this rule within the period of this survey. It will not, therefore, receive any further discussion. *See* State v. Ratkovich, 111 Mont. 19, 105 P.2d 679 (1940); State v. Traufer, 109 Mont. 275, 97 P.2d 336 (1939); State v. Clark, 102 Mont. 432, 58 P.2d 276 (1936); State v. Dixson, 80 Mont. 181, 260 P. 138 (1927); State v. Smith, 65 Mont. 458, 211 P. 208 (1922).

admissibility of statements, admissions, or confessions."[12] "Voluntariness," as used in this legal sense, has acquired a meaning much different from that attributed to the word in everyday usage. It has become a legal term of art, a shorthand expression for the complex of fundamental values underlying the prohibition against the use of confessions obtained illegally.[13]

Whether a statement or confession was voluntarily made has been frequently said to turn on the "totality of the circumstances" of the particular case.[14] The next three subsections of this survey will examine three different aspects of the "totality of the circumstances" test. In evaluating a case under this test, the trial court must determine (1) whether promises, threats, or an inherently coercive atmosphere of the interrogation rendered the statements untrustworthy; (2) whether the conduct of the police under the circumstances of the case overpowered the will of the accused to resist or was so reprehensible as to require exclusion; and (3) whether the statements, although neither induced nor coerced by any misconduct on the part of the police, were truly the product of a rational intellect and a free and unrestrained will.

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12. State v. Lenon, ___ Mont. ___, 570 P.2d 901, 906 (1977); Brown v. Illinois, 422 U.S. 590, 604 (1975).

13. 3 WIGMORE ON EVIDENCE § 826 (Chadbourn rev. 1970) ("[T]he term 'voluntary' is a word of art which should not be taken in any lay or colloquial sense . . . . [I]n its legal sense the term is a compendious expression intended to indicate in summary form multiple factors of legal significance. These factors embrace a wide range or complex of values which modern confession law considers and which that law seeks to maximize."); Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("[A] complex of values underlies the stricture against use by the state of a confession which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."); People v. Sigal, 221 Cal. App. 2d 684, 696, 34 Cal. Rptr. 767, 775 (1963) ("In weighing confession admissibility, the courts have continued to use the terminology of human volition, while basing their decisions in large part upon the acceptability of police conduct. Due process thus invests the word 'voluntary' with connotations far broader than dictionary definitions. Preservation of freedom of the will is only one of several interests at stake. Another interest is the courts' rejection of confessions produced by illegal police action. The notion of an involuntary confession has become a 'convenient shorthand' for describing a complex of values which underlies the determination of admissibility."); A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 167 (Tent. Draft No. 1, 1966) ("[T]he concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellant to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity for rational choice." *Quoted in* 3 WIGMORE ON EVIDENCE § 826 (Chadbourn rev. 1970)).

14. Frazier v. Cupp, 394 U.S. 731, 739 (1969); Boulden v. Holman, 394 U.S. 478, 480 (1969); State v. Blakney, ___ Mont. ___, 605 P.2d 1093, 1096 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 202 (1979); State v. Lenon, 174 Mont. 264, 271, 570 P.2d 901, 906 (1977).

2. *Three Facets of the Voluntariness Test*

a. *Trustworthiness*

At common law a confession which was found to be untrustworthy was deemed involuntary and inadmissible.[15] If the promise or threat prompting the confession was adjudged to be an inducement which would lead a reasonable man to confess with complete disregard for the truth, the confession was untrustworthy and excluded.[16] This was essentially the test enunciated by the United States Supreme Court in the 1884 case of *Hopt v. Utah*.[17] The Court there noted the generally accepted view that although confession evidence must be subjected to careful scrutiny and received with caution, a voluntary confession of guilt was among the strongest forms of evidence.[18] The Court pointed out that great weight was given to such evidence because it was presumed that one who was innocent would not imperil his safety or prejudice his interest by an untrue statement. This presumption ceased to exist, however, when the confession was made because of a threat or promise which operated upon the fears or hopes of the accused, depriving him of "that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."[19]

Until at least 1952, the Montana Supreme Court used this common law test as the sole criterion by which the voluntariness of a confession was determined.[20] The Montana court would only exclude a confession if it were shown to have been prompted by some inducement sufficient to cause a reasonable person to confess regardless of the truth of his statement.[21] The court's rejection of such "involuntary" confessions was based upon "the unreliability of such testimony—the probability of the statements being untrue."[22] The object of the rule, according to the court, was not to exclude a confession that was truthful, but to avoid the possibility of a confession of guilt being used against one who was in fact

15. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 511 (4th ed. 1974); *see also* 3 WIGMORE ON EVIDENCE § 822(a) (Chadbourn rev. 1970).

16. *Id.*

17. 110 U.S. 574 (1884).

18. *Id.* at 584-85.

19. *Id.* at 585.

20. In State v. Robuck, 126 Mont. 302, 308-09, 248 P.2d 817, 820 (1952), the Montana court held that the "test applied in determining whether a confession is voluntary and hence admissible is, 'Was the inducement held out to the accused such as that there is any fair risk of a false confession?' " *Citing* State v. Sherman, 35 Mont. 512, 90 P. 981 (1907), which first established that rule for Montana.

21. State v. Sherman, 35 Mont. 512, 520, 90 P. 981, 983 (1907).

22. *Id.*

innocent.[23]

The common law test utilized by the Montana court had also been utilized by the Connecticut Supreme Court in the case of *Rogers v. Richmond.*[24] Upon review, the Supreme Court held that a legal standard which gives decisive weight to the probable truth or falsity of a confession violates the due process clause of the Fourteenth Amendment.[25] In so holding, the Supreme Court pointed out that it is not unreliability which renders a confession involuntary, but rather the fact that the confession was the product of coercion, either physical or psychological.[26] Such confessions are offensive to the due process clause because "the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[27] This decision clearly set a new emphasis in evaluating the voluntariness of confessions. Courts were no longer to look to the reasonable man and the probable trustworthiness of his statements, but rather to the conduct of law enforcement officials and its probable tendency to overbear the accused's will to resist.[28] The trustworthiness test was not completely rejected. It simply could no longer serve as the sole criterion by which voluntariness was determined.

The Montana Supreme Court, in *State v. White,*[29] expressly retreated from the trustworthiness rationale of its earlier decisions and, in reliance on *Jackson v. Denno,*[30] required a determination of voluntariness not influenced by the truth or falsity of the statements made.[31] The court's position in this regard became somewhat uncertain, however, when, in *State v. Lenon,*[32] the court evaluated the voluntariness of the defendant's confession by analyzing whether the totality of the circumstances was such as to overbear the defendant's will and create any fair risk of a false confession,[33]

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23. *Id.*
24. 365 U.S. 534 (1961).
25. *Id.* at 543.
26. *Id.* at 540.
27. *Id.* at 540-41.
28. *Id.* at 544. *See generally* Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice,* 8 DEPAUL L. REV. 213 (1959) and Paulsen, *The Fourteenth Amendment and the Third Degree,* 6 STAN. L. REV. 411 (1954).
29. 146 Mont. 226, 405 P.2d 761 (1965), *cert. denied,* 384 U.S. 1023 (1966).
30. 378 U.S. 368 (1964).
31. 146 Mont. 226, 235, 405 P.2d 761, 766 (1965), *cert. denied,* 384 U.S. 1023 (1966).
32. ___ Mont. ___, 570 P.2d 901 (1977).
33. *Id.* at ___, 570 P.2d at 906.

citing pre-*White* decisions[34] as authority. The court has since clarified its position and returned to that taken in *White* in the recent decision of *State v. Allies*[35] in which it recognized that the use of an involuntary confession, whether true or false, violates both the guarantee against self-incrimination and the right to due process of law.[36]

b. *Police Practices*

(1) *The Constitutional Perspective*

Rogers v. Richmond[37] was not the first decision of the Supreme Court which found that the methods used by law enforcement officers to extract a confession from an accused were incompatible with the constitutional requirements of due process. Some twenty-five years earlier the Supreme Court first found a state court conviction to be in violation of the Fourteenth Amendment due process clause because it was procured through the use of an involuntary confession. In *Brown v. Mississippi*,[38] it was undisputed, even in the state court, that extreme brutality[39] had been used to extract the confessions from the defendants, that provided the primary evidence upon which their convictions were based. The Supreme Court declared the methods used "revolting to the sense of justice" and held the use of confessions obtained through violence as the basis for a conviction to be a clear denial of due process.[40]

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34. State v. Robuck, 126 Mont. 302, 248 P.2d 817 (1952); State v. Sherman, 35 Mont. 512, 90 P. 981 (1907).

35. ___ Mont. ___, 606 P.2d 1043, 1049 (1979). In that decision, the court pointed out that involuntary confessions were excluded historically because they were felt to be untrustworthy. Conceding that that rationale might retain some vitality, the court asserted that it is no longer acceptable as the sole reason for the exclusion of an involuntary confession.

36. *Id., citing* Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532, 542 (1897) for the proposition that the use of an involuntary confession violates the guarantee against self-incrimination and Blackburn v. Alabama, 361 U.S. 199, 205 (1960) for the proposition that it violates due process.

37. 365 U.S. 534 (1961).

38. 297 U.S. 278 (1936).

39. One defendant was taken by a deputy sheriff to the house of the deceased where a mob of white men accused him of the crime, hung him from the limb of a tree, and whipped him with a rope. The next day the deputy arrested him and before taking him to jail severely whipped him telling him the whipping would continue until he confessed to a statement the deputy would dictate. The other two defendants were arrested, taken to jail, forced to strip, laid across a chair, and beaten with leather belts with the straps and buckles cutting into their backs. They too were told that the whipping would continue until they confessed.

40. 297 U.S. 278, 286 (1936).

Post-*Brown* decisions[41] demonstrate that the voluntariness of statements made by an accused can be vitiated as easily by psychological coercion as by physical violence.[42] As the Court stated in *Watts v. Indiana*,[43] "There is torture of mind as well as body; the will is as much affected by fear as by force."[44] A confession which is "the product of sustained pressure by the police" is not voluntary: "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal."[45] *Brown* and its progeny thus provide a line of authority for the proposition that it is a violation of due process under both the Fifth and Fourteenth Amendments to convict a defendant on

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41. *See, e.g.*, Reck v. Pate, 367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

42. Numerous decisions of the United States Supreme Court reflect this recognition that the use of subtle psychological pressures brought to bear upon an accused can accomplish behind the closed door of the interrogation room exactly what the Constitution prohibits, that is, "make a suspect the unwilling collaborator in establishing his guilt. This [the police] may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices." Culombe v. Connecticut, 367 U.S. 568, 575 (1961) (Frankfurter, J., plurality opinion). While conceding the authorized role of interrogation in protecting society from criminals, Justice Frankfurter also pointed out that the very atmosphere of custodial interrogation can be utilized to compel an accused to convict himself:

> Since under the procedures of Anglo-American criminal justice [persons suspected of crime] cannot be constrained by legal process to give answers which incriminate them, the police have resorted to other means to unbend their reluctance, lest criminal investigation founder. Kindness, cajolery, entreaty, deception, persistent cross-questioning, even physical brutality have been used to this end. In the United States, "interrogation" has become a police technique, and detention for purposes of interrogation a common, although generally unlawful, practice. Crime detection officials, finding that if their suspects are kept under tight police control during questioning they are less likely to be distracted, less likely to be recalcitrant and, of course, less likely to make off and escape entirely, not infrequently take such suspects into custody for "investigation."
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> . . . .
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> In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion —inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks.

Id. at 571-76 [footnotes omitted].

43. 338 U.S. 49 (1949).

44. *Id.* at 52.

45. *Id.* at 53.

the basis of a confession obtained by means of physical violence or psychological coercion. As this line of decisions developed, the Court recognized that law enforcement officers became more aware of the burden which they shared in protecting the fundamental rights of citizens, including those citizens suspected of crime.[46] But as police officers became more responsible, the methods used to extract confessions became more sophisticated and the task of the Court in enforcing federal constitutional protections became more difficult because of the "delicate judgments to be made" in evaluating the question of voluntariness and due process of law under the "totality of the circumstances" of a particular case.[47]

Three different tasks or concerns of the Court have focused its attention on the methods used by law enforcement officers to extract a confession from an accused. The court has the role of (1) protecting the individual accused by prohibiting police violation of his constitutionally guaranteed rights; (2) protecting society by requiring that those who enforce the law also obey it; and (3) protecting the integrity of an accusatorial system of justice by requiring society to bear the burden of proving the charge against an accused and by refusing to allow society to compel him to convict himself.

In its role as protector of the individual, the Court recognized an inherent conflict between society's interest in prompt and efficient law enforcement and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.[48] Enforcement of the law, though important, could not be allowed to compromise either an individual's constitutionally guaranteed rights or other values considered fundamental to our system of government. The aim of the Fourteenth Amendment due process requirement is to prevent fundamental unfairness to an accused in the use of evidence,[49] that is, to protect an accused's right to a fair trial. Both the Fifth Amendment privilege against self-incrimination[50] and the Sixth Amendment right of assistance of counsel[51] are included in the Fourteenth Amendment

46. Spano v. New York, 360 U.S. 315, 321 (1959).

47. *Id.*

48. *Id.* at 315.

49. Rochin v. California, 342 U.S. 165, 173 (1952) ("Coerced confessions offend the community's sense of fair play and decency."); Lisenba v. California, 314 U.S. 219, 236 (1941).

50. U.S. CONST. amend V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

51. U.S. CONST. amend VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

due process guarantee.[52] Confessions obtained in violation of either of these two rights, are, therefore, dubbed "involuntary," under the police practices rationale. To preserve their viability and hence the defendant's right to a fair trial, it became necessary to extend the protection of these two guarantees to various stages of pretrial contact between law enforcement officials and the accused.[53] It makes little sense for the Court to assiduously guard against fundamental unfairness within the courtroom while allowing the same unfairness to be exploited outside of the courtroom as a means of gathering evidence to be used against the accused at trial.[54]

In its role as protector of society, the Court was intent upon requiring that the police obey the law while enforcing it, realizing that "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[55] Finally, the Court has asserted a need to maintain the integrity of our accusatorial system of justice.[56] In an accusatorial, in contrast to an inquisitorial, system of law, "society carries the burden of proving its charge

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52. Malloy v. Hogan, 378 U.S. 1 (1964) made the Fifth Amendment privilege against self-incrimination applicable to the states under the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963) made the Sixth Amendment right to counsel applicable to the states and required the appointment of counsel for indigent defendants in felony cases. Argersinger v. Hamlin, 407 U.S. 25 (1972) extended the holding in *Gideon* to all criminal prosecutions, however minor, that actually result in imprisonment. Scott v. Illinois, ___ U.S. ___, 99 S.Ct. 1158 (1979) held that no indigent criminal defendant may be sentenced to a term of imprisonment unless the state has afforded him the right to appointed counsel.

53. In the Sixth Amendment context, the right to counsel has been extended to those stages of a formal criminal prosecution (Kirby v. Illinois, 406 U.S. 682 (1972)) which are "critical" (United States v. Wade, 388 U.S. 218 (1967)) and involve a "trial-like confrontation" (United States v. Ash, 412 U.S. 300 (1973)). *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary examination); United States v. Wade, 388 U.S. 218 (1967) (lineups). Miranda v. Arizona, 384 U.S. 436 (1966) clearly held that the privilege against self-incrimination applies to custodial interrogation situations.

54. Lisenba v. California, 314 U.S. 219, 236-37 (1941).

55. Spano v. New York, 360 U.S. 315, 320-21 (1959).

56. Watts v. Indiana, 338 U.S. 49, 54-55 (1949); Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). *But see*, Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 913 (1979):

> The police, with society's approval, seek to obtain the truth from a suspect, who, if guilty, has nothing to gain and much to lose from giving the police what they want. By its very nature, therefore, police interrogation has inquisitional attributes, and we do not advance our analysis by asserting that ours is an adversary or accusatorial system. To start with such an assertion is to conclude in advance that police interrogation, at least as we have known it, should not exist.

Professor Grano suggests that police interrogation, though inquisitorial by nature, is necessary and authorized in our society and that due process does not require equality of knowledge and sophistication between the police and criminal suspects since such an equality would effectively eliminate all confessions. He suggests that due process simply prohibits undue advantage from being taken of a defendant by police. *Id.* at 909-19.

against the accused[;] [i]t must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation."[57] In any one case, any one of these concerns may dominate and a confession may be excluded under the due process clause because to allow its inclusion would be fundamentally unfair, would amount to approval of illegal police conduct, or would subvert our accusatorial system of justice.

Under this "police practices" evaluation, the underlying test of admissibility remains "voluntariness,"[58] and "voluntariness" is a function of the "totality of the circumstances."[59] A discussion of "significant" police practices within this analysis must be approached with caution because it is not generally the presence of any particular practice which is dispositive,[60] but rather the combination or eggregious nature of those practices found to be present. Strict guidelines are both elusive and illusory in the confessions context, as has been pointed out in the search and seizure context.[61] The courts have been reluctant to enunciate hard and fast rules which may prove inadequate to deal with new modes of coercion that may emerge from the "perpetual Pandora's box"[62] of police practices.[63] A brief overview of the numerous practices found to be coercive can be useful in ascertaining the limitations imposed by the constitutional requirement that confessions, to be admissible, be "voluntary."

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57. Watts v. Indiana, 338 U.S. 49, 54 (1949). The Court cited 2 HAWKINS, PLEAS OF THE CROWN, c. 46, § 34 (8th ed. 1824) as authority: "The law will not suffer a prisoner to be made the deluded instrument of his own conviction."

58. *See* note 12 *supra*.

59. *See* note 14 *supra*.

60. State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 202 (1979); State v. Lenon, ___ Mont. ___, 570 P.2d 901, 906 (1977).

61. *See* notes 428-30 *infra* and accompanying texts.

62. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 387 (1974) [hereinafter cited as Amsterdam, *Perspectives*].

63. Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961) (Frankfurter, J., plurality opinion):

> It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved . . . . The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession a product of an essentially free and unconstrained choice by its maker? If it is, he has willed to confess, and it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process [citation omitted].

Detention, especially prolonged detention,[64] is often held to be coercive. Protracted interrogation, whether subjecting the accused to lengthy questioning sessions,[65] to day-and-night sessions,[66] to a continual stream of questioning by relays of officers,[67] to questioning by groups of officers,[68] or simply to sporadic interrogation sessions over a number of days,[69] is also potentially coercive. The place of detention or interrogation[70] can be significant in determining voluntariness as can the fact that the accused was deprived of necessities, such as food[71] or sleep.[72] Similarly, efforts to isolate an accused by, for example, holding him incommunicado[73] and deny-

64. Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); Reck v. Pate, 367 U.S. 433 (1961); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Turner v. Pennsylvania, 338 U.S. 62 (1949); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1943); Chambers v. Florida, 309 U.S. 227 (1940).

65. Reck v. Pate, 367 U.S. 433 (1961) (six and seven hour sessions); Blackburn v. Alabama, 361 U.S. 199 (1960) (eight to nine hours); Spano v. New York, 360 U.S. 315 (1959) (eight hours); Leyra v. Denno, 347 U.S. 556 (1954) (eight and fourteen hour sessions); Watts v. Indiana, 338 U.S. 49 (1949) (five nights); Ashcraft v. Tennessee, 322 U.S. 143 (1943) (36 hours); Harris v. South Carolina, 338 U.S. 68 (1949) (numerous four to five and one-half hour sessions); Chambers v. Florida, 309 U.S. 227 (1940) (five days of intensive interrogation culminating in all night session).

66. Spano v. New York, 360 U.S. 315 (1959); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 332 U.S. 143 (1943); Chambers v. Florida, 309 U.S. 227 (1940).

67. Harris v. South Carolina, 338 U.S. 68 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 322 U.S. 143 (1943).

68. Reck v. Pate, 367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949).

69. Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); Culombe v. Connecticut, 367 U.S. 568 (1961); Fikes v. Alabama, 352 U.S. 191 (1957).

70. Brooks v. Florida, 389 U.S. 413 (1967) (defendant-inmate kept for fourteen days in small punishment cell which had no bed, no windows, and a hole in the floor which served as a toilet); Davis v. North Carolina, 384 U.S. 737 (1966) (defendant held for sixteen days in small cell with no windows); Blackburn v. Alabama, 361 U.S. 199 (1960) (defendant questioned for eight to nine hours in six by eight foot room with as many as three officers present); Harris v. South Carolina, 338 U.S. 68 (1949) (defendant questioned in six by ten foot room by officers who had to work in relays to permit them some relief from the stifling heat); Watts v. Indiana, 338 U.S. 59 (1949) (two days of solitary confinement in cell aptly called "the hole"); Ashcraft v. Tennessee, 322 U.S. 143 (1943) (defendant kept at table in homicide investigating office with electric light over his head for thirty-six hours of questioning).

71. Brooks v. Florida, 389 U.S. 413 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); Reck v. Pate, 367 U.S. 433 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Watts v. Indiana, 338 U.S. 49 (1949).

72. Clewis v. Texas, 386 U.S. 707 (1967); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 322 U.S. 143 (1943); Chambers v. Florida, 309 U.S. 227 (1940).

73. Mincey v. Arizona, 437 U.S. 385 (1978) (accused in pain and shock in hospital, isolated from family, friends, and legal counsel); Clewis v. Texas, 386 U.S. 707 (1967) (held incommunicado for nine days); Davis v. North Carolina, 384 U.S. 737 (1966) (held incommu-

ing friends and relatives or his attorney access to him[74] are denounced as coercive violations of the accused's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. Police are generally required by statute to bring an accused before a judicial magistrate without unnecessary delay.[75] Frequent violations of the statute in an effort to obtain incriminating statements or evidence from an accused have resulted in a court-imposed exclusionary rule in some jurisdictions mandating exclusion of all statements or evidence obtained in the interim.[76] Such delays are in any event generally held to weigh against the voluntariness of the procured admissions.[77] Additionally, since 1966, failure to advise an accused subjected to custodial interrogation of his constitutional rights to consult with counsel and to remain silent results in automatic exclusion of statements obtained.[78] Even before the decision of *Mi-*

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nicado sixteen days); Haynes v. Washington, 373 U.S. 503 (1963) (held incommunicado five to seven days); Gallegos v. Colorado, 370 U.S. 49 (1962) (incommunicado five days); Reck v. Pate, 367 U.S. 433 (1961) (incommunicado four days); Culombe v. Connecticut, 367 U.S. 568 (1961) (request for counsel denied because illiterate defendant could not give officer name of attorney to call); Spano v. New York, 360 U.S. 315 (1959) (repeated request to consult with counsel denied); Payne v. Arkansas, 356 U.S. 560 (1958) (held incommunicado three days); Fikes v. Alabama, 352 U.S. 191 (1957) (taken to prison eighty miles away from home, held incommunicado three days); Watts v. Indiana, 338 U.S. 49 (1949) (held incommunicado six days); Harris v. South Carolina, 338 U.S. 68 (1949) (held incommunicado five days); Turner v. Pennsylvania, 338 U.S. 62 (1949) (held incommunicado five days and nights); Haley v. Ohio, 332 U.S. 596 (1948) (held incommunicado five days); Malinski v. New York, 324 U.S. 401 (1945) (held incommunicado four days); Chambers v. Florida, 309 U.S. 227 (1940) (held incommunicado five days). The fact that an accused is allowed to visit with family and friends militates against a finding of involuntariness. Lyons v. Oklahoma, 322 U.S. 596 (1944).

74. Gallegos v. Colorado, 370 U.S. 49 (1962) (mother denied permission to see defendant); Reck v. Pate, 367 U.S. 433 (1961) (father denied permission to see defendant); Payne v. Arkansas, 356 U.S. 560 (1958) (family denied permission to see defendant); Fikes v. Alabama, 352 U.S. 191 (1957) (father and lawyer denied permission to see defendant); Haley v. Ohio, 332 U.S. 596 (1948) (mother and lawyer denied permission to see defendant).

75. *See* McNabb v. United States, 318 U.S. 332, 342-43 n. 7 (1943) in which the Court enumerated statutes enacted in nearly every state requiring that arrested persons be promptly taken before a committing authority. In Montana, the statutory requirement is currently codified at MCA § 46-7-101 (1979).

76. *See* note 9 *supra.*

77. Clewis v. Texas, 386 U.S. 707 (1967); Haynes v. Washington, 373 U.S. 503 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Turner v. Pennsylvania, 338 U.S. 62 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940). The exclusionary rule which the United States Supreme Court adopted in United States v. McNabb, 318 U.S. 332 (1943), in the exercise of its supervisory powers over the federal courts, has never been imposed upon the state as a constitutional requirement of due process. *See* note 9 *supra. See also* Annot., 1 L. Ed. 2d 1735, 1747 (1957); Annot., 19 A.L.R.2d 1331 (1951).

78. Miranda v. Arizona, 384 U.S. 436 (1966).

randa v. Arizona,[79] however, the Supreme Court held in numerous decisions that a failure to so advise a defendant was a significant factor in determining the voluntariness of a confession.[80]

Other aspects of police conduct which pertain to voluntariness include the use of threats of harm against the accused or those close to him,[81] suggestions or promises of leniency,[82] dictation of a confession by police,[83] and the use of deceit or trickery.[84] The list of practices might well be expanded by specific circumstances present in a particular case. The period prior to arraignment is the period in which the rights of the accused are generally least protected. It is a period which lends itself to "secret inquisitional processes" which render a confession suspect and less likely to be voluntary.[85]

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79. 384 U.S. 436 (1966).

80. Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Haley v. Ohio, 332 U.S. 596 (1948).

81. Lynum v. Illinois, 372 U.S. 528 (1963) (defendant told state aid to her infant children would be cut off and her children taken from her unless she cooperated); Reck v. Pate, 367 U.S. 433 (1961) (defendant placed on exhibition before over one hundred people); Payne v. Arkansas, 356 U.S. 560 (1958) (threat of mob violence); Malinski v. New York, 324 U.S. 401 (1945) (defendant stripped and kept naked for three hours then allowed to put on only shoes, socks, underwear and a blanket until he confessed); Chambers v. Florida, 309 U.S. 227 (1940) (continual threats and physical mistreatment denounced by the Court, although not dispositive in decision because evidence on that point was conflicting).

82. Lynum v. Illinois, 372 U.S. 528 (1963) (promise to recommend leniency); Turner v. Pennsylvania, 338 U.S. 62 (1949) ("it'll go easier on you").

83. Blackburn v. Alabama, 361 U.S. 199 (1960) (confession composed by deputy sheriff on basis of defendant's answers to questions); Spano v. New York, 360 U.S. 315 (1959) (confession in question-and-answer form based on leading questions from prosecutor); Chambers v. Florida, 309 U.S. 227 (1940) (first confessions rejected, interrogation continued until "better" confession obtained); Brown v. Mississippi, 297 U.S. 278 (1936) (confessions dictated).

84. (a) Defendant told accomplices had confessed: Frazier v. Cupp, 394 U.S. 731 (1969) (denounced but held insufficient to hold confession involuntary); Haley v. Ohio, 332 U.S. 596 (1948) (defendant shown alleged confession of accomplice); Lisenba v. California, 314 U.S. 219 (1941) (denounced but held insufficient to render confession involuntary).

(b) Use of friends to work on defendant's sympathies: Culombe v. Connecticut, 367 U.S. 568 (1961) (business partner); Spano v. New York, 360 U.S. 315 (1959) (officer, a childhood friend, claimed job and family security in jeopardy if defendant did not confess); Leyra v. Denno, 347 U.S. 556 (1954) (defendant's wife brought in to help get defendant to confess).

(c) Use of psychiatrist to interrogate defendant while posing as medical doctor: Leyra v. Denno, 347 U.S. 556 (1954).

(d) Davis v. North Carolina, 384 U.S. 737 (1966) (use of prayer by officer). *See generally* Dix, *Mistakes, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275 (1975); Annot. 99 A.L.R.2d 772 (1965).

85. Gallegos v. Colorado, 370 U.S. 49, 50-51 (1962).

(2) *Police Practices and Montana Case Law*

The "trustworthiness" test was the sole test of voluntariness utilized by the Montana Supreme Court in confession cases until that test was held insufficient under the due process clause by the United States Supreme Court.[86] In *State v. White*,[87] the Montana court looked for the first time to the confession cases decided by the United States Supreme Court for constitutionally mandated standards of voluntariness. The defendant was a sixteen-year-old boy who, after two to three hours of police interrogation, confessed to a murder committed with an axe in the course of a burglary. The defendant claimed the confession upon which his conviction was based had been involuntarily given. The Montana court reviewed the United States Supreme Court decisions which had held the admission of a confession into evidence in state courts to be violative of due process. After reviewing those cases, the court found no reprehensible police conduct equivalent to that denounced in the decisions of the Supreme Court and so held the confession to have been voluntarily given. This decision did establish that the Montana court was cognizant of the "police practices" voluntariness test. The court's awareness of the duty to apply the test became more apparent in *State v. Smith*,[88] in which the court held, "when a motion to suppress is presented to a trial court, its analysis of the evidence . . . must focus on whether impermissible procedures were followed by law enforcement authorities."[89]

Three recent Montana decisions demonstrate the court's growing concern with the application of the voluntariness test.[90] In *State v. Blakney*[91] the court acknowledged the need to examine police conduct in determining the voluntariness of a confession, but found no impermissible police conduct present. In *State v. Grimestad*[92] the supreme court affirmed the granting of defendant's motion to suppress. The court pointed to various police practices providing substantial support for the trial court's finding of involuntariness, including repeated assurances by the officers that the defendant was not a suspect, continual suggestions by the officers as to how the shooting had to have happened, the addition

86. *See* notes 15-36 and accompanying text *infra*.

87. 146 Mont. 226, 405 P.2d 761 (1965), *cert. denied*, 384 U.S. 1023 (1966).

88. 164 Mont. 334, 523 P.2d 1395 (1975).

89. *Id.* at 338, 523 P.2d at 1397.

90. State v. Allies, ___ Mont. ___, 606 P.2d 1043 (1979); State v. Blakney, ___ Mont. ___, 605 P.2d 1093 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198 (1979).

91. ___ Mont. ___, 598 P.2d 198 (1979).

92. ___ Mont. ___, 605 P.2d 1093 (1979).

of a sentence to the defendant's statement at the request of an officer, and a threat of incarceration at Warm Springs, the state mental hospital.

A similar concern for unfair and illegal police practices is evident in *State v. Allies*,[93] in which the court reversed the conviction of the defendant for the heinous drug-related killing of a family of four. The defendant was subjected to psychological forms of coercion which rendered his confession involuntary.[94] Many of the police tactics used had been earlier denounced by the Supreme Court in *Miranda:* "keeping the suspect incommunicado in a small room; isolating the suspect in a hostile police environment; the mean cop-nice cop interrogation technique; and, the guilt assumption technique of interrogation."[95] Additionally, the police in *Allies* used a truth serum to obtain a confession in direct contravention of the defendant's right to counsel.[96]

The Montana court's strong disapproval of practices already held to be coercive by the United States Supreme Court was to be expected. Of greater significance perhaps is the court's vigorous denunciation of the use of police deception to secure a confession. In *Allies,* police officers lied to the defendant leading him to believe that they knew much less than they did about his involvement in the crimes and tried to convince him that his problem was medical or psychiatric rather than criminal.[97] This deception was said to be "particularly repulsive to and totally incompatible with the concepts of due process embedded in the federal and state constitutions."[98] Unlike earlier decisions which had permitted police deception with little or only mild disapproval,[99] the court's holding in

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93. ___ Mont. ___, 606 P.2d 1043 (1979).

94. *Id.* at ___, 606 P.2d at 1050.

95. *Id.*

96. *Id.* at ___, 606 P.2d at 1051.

97. *Id.*

98. *Id.*

99. State v. Rossell, 113 Mont. 457, 465-66, 127 P.2d 379, 382-83 (1942) (false statements of officers regarding the non-existence of evidence which would support defendant's claim of ownership held insufficient to require finding of involuntariness); State v. Robuck, 126 Mont. 302, 309-10, 248 P.2d 817, 820 (1952) (fact that officer did make false statements to the accused regarding her family would not make confession later obtained inadmissible); State v. White, 146 Mont. 226, 234, 405 P.2d 761, 765 (1965), *cert. denied,* 384 U.S. 1023 (1966) (misinformation regarding evidence incriminating defendant "did not bring any undue pressure to bear on the defendant, and the fact that he may have suffered a slip of the tongue [incriminating himself] does not establish coercion"). In State v. Lenon, 174 Mont. 264, 272, 570 P.2d 901, 906 (1977) the court said, "We cannot overemphasize our strong condemnation of police practices . . . wherein a police officer misinforms a defendant as to other arrestees having given confessions . . .," but held that the deception used was insufficient to render the confession involuntary.

Allies may indicate that deceptive practices in themselves could require reversal.[100] American courts have traditionally disapproved of police deception, but have seldom found it sufficient to render a confession involuntary absent other coercive factors.[101]

c. *Product of a Rational Intellect and Free Will*[102]

In *Blackburn v. Alabama*,[103] the Supreme Court focused on a third aspect of the voluntariness test: to be "voluntary" a confession must be "the product of a rational intellect and a free will."[104] In *Blackburn*, the defendant was mentally ill. To incarcerate a human being upon the basis of a statement he made while insane would, according to the Court, affront a basic sense of justice inherent in our constitutional system.[105] This facet of the voluntariness test can be closely related to the police practices aspect of the test since police practices might well determine whether a statement made by an accused while in police custody was, in fact, the product of "an essentially free and unconstrained choice by its maker."[106] Other characteristics of the particular accused may, however, make him more susceptible to police pressure or totally unable to make a rational choice to confess or remain silent. The "circumstances of pressure" must be weighed "against the power of resistance of the person confessing."[107] This requires an individualized case-by-case analysis because "[w]hat would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[108] An accused's subnormal intelligence[109] or

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100. *See also* State v. Grimestad, ___ Mont. ___, 598 P.2d 1146 (1979) in which a police statement to the defendant that he was not a suspect and that he need not be concerned about his *Miranda* rights was denounced as deceptive and contributing to an involuntary confession.

101. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969); Spano v. New York, 360 U.S. 315 (1959) and Leyra v. Denno, 347 U.S. 556 (1954). *See generally* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L. Q. 275, 300-25 (1974) and Annot., 99 A.L.R.2d 772 (1965).

102. *See generally* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 868-80 (1959).

103. 361 U.S. 199 (1960).

104. *Id.* at 208.

105. *Id.* at 207.

106. Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (Frankfurter, J., plurality opinion).

107. Fikes v. Alabama, 352 U.S. 191, 197 (1957).

108. *Id.* at 197-98.

109. Culombe v. Connecticut, 367 U.S. 568 (1961) (minor); Reck v. Pate, 367 U.S. 433 (1961) (mentally retarded); Payne v. Arkansas, 356 U.S. 560 (1958) (mentally dull); Fikes v. Alabama, 352 U.S. 191 (1957) (low mentality).

lack of education,[110] mental illness[111] or physical condition,[112] including the influence of drugs or alcohol,[113] have been held to be factors which can make him more susceptible than the average adult to pressures designed to extract a confession from him. Children, by virtue of their age[114] and inexperience,[115] are presumed to be more likely to yield to police coercion.

Courts do not generally delineate their voluntariness analysis into the three categories of trustworthiness, police conduct, and personal traits of the accused. These three facets of the test are nevertheless clearly discernible. Two recent Montana cases[116] deal with this third facet of the test. In *State v. Blakney*,[117] the court looked at an extensive list of factors which other courts had found relevant to a determination of the voluntariness of statements made by a youthful defendant,[118] and held Blakney's confession to

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110. Clewis v. Texas, 386 U.S. 707 (1967) (fifth grade education); Davis v. North Carolina, 384 U.S. 737 (1966) (third or fourth grade); Culombe v. Connecticut, 367 U.S. 568 (1961) (illiterate); Spano v. New York, 360 U.S. 315 (1959) (one and one-half years high school); Payne v. Arkansas, 356 U.S. 560 (1958) (fifth grade education); Fikes v. Alabama, 352 U.S. 191 (1957) (third grade); Harris v. South Carolina, 338 U.S. 68 (1949) (illiterate); Chambers v. Florida, 309 U.S. 227 (1940) (ignorant).

111. Blackburn v. Alabama, 361 U.S. 199 (1960) (insane); Spano v. New York, 360 U.S. 315 (1959) (history of emotional instability); Fikes v. Alabama, 352 U.S. 191 (1957) (schizophrenic).

112. Mincey v. Arizona, 437 U.S. 385 (1978) (defendant was interrogated while in hospital bed with tubes, catheter, and intravenous feeding devices attached to his body; lapsed into unconsciousness periodically; weakened by pain and shock); Clewis v. Texas, 386 U.S. 707 (1967) (appeared ill); Jackson v. Denno, 378 U.S. 368 (1964) (suffering from bullet wound which resulted in leg amputation); Reck v. Pate, 367 U.S. 433 (1961) (ill, vomiting blood).

113. Jackson v. Denno, 378 U.S. 368 (1964) (interrogated shortly after drugs were administered to alleviate pain of bullet wound); Reck v. Pate, 367 U.S. 433 (1961) (suffering withdrawal pains of narcotic addiction).

114. Gallegos v. Colorado, 370 U.S. 49 (1962) (fourteen-year-old boy); Reck v. Pate, 367 U.S. 433 (1961) (nineteen-year-old boy); Haley v. Ohio, 332 U.S. 596 (1948) (fifteen-year-old boy).

115. United States v. Hilliker, 436 F.2d 101 (9th Cir. 1970), *cert. denied*, 401 U.S. 958 (1971).

116. State v. Allies, ___ Mont. ___, 606 P.2d 1043 (1979); State v. Blakney, ___ Mont. ___, 605 P.2d 1093 (1979).

117. ___ Mont. ___, 605 P.2d 1093 (1979).

118. *Id.* at ___, 605 P.2d at 1096. The factors the court considered included (1) the age of the accused; (2) the education of the accused; (3) knowledge of the accused as to the substance of the charge and his constitutional rights; (4) whether the accused was held incommunicado or allowed to consult with relatives, friends, or an attorney; (5) whether the accused was interrogated; (6) methods used in interrogation; (7) length of interrogation; (8) whether the accused refused to voluntarily give statements on prior occasions; (9) whether the accused repudiated an extrajudicial statement at a later date; (10) mental capacity of the accused; (11) the use of polygraph examinations; and (12) the accused's prior experience with the criminal justice system and in the adult world.

be voluntary. In *State v. Allies*,[119] the court based its ultimate holding that the statements were involuntary on prohibited police practices. In relating the facts of the case, however, the court also pointed out that the defendant did not seem to be in control of his faculties much of the time because he was under the influence of a large quantity of drugs and was suffering from narcotic withdrawal pains. The coercive factors suggesting involuntariness were so numerous that the court did not dwell on the accused's drugged state and its effect on the voluntariness of the statements made. The Supreme Court has held, however, that the standards which render a confession inadmissible if it is the product of physical intimidation or psychological pressure are "equally applicable to a drug-induced state."[120]

In summary, then, the legal test of voluntariness will render a confession inadmissible if it was procured under circumstances which render it untrustworthy, if the methods used by police to extract the confession require its suppression, or if personal traits or the condition of the accused make it evident that the statements were not the product of a rational intellect and free will. Recent Montana cases have been particularly attentive to the police practices used to obtain a confession and strongly denounce the use of deception as well as other methods designed to take unfair advantage of an accused.

C. *Other Recent Developments*

This subsection of the survey on the law of confessions will focus on the significance of recent Montana decisions without providing any extensive background to the particular area.

1. *Volunteered Statements*

In *State v. Ryan*,[121] police officers came to the defendant's home to execute a search warrant for guns the defendant had reported as stolen and for which the defendant had collected insurance proceeds. Upon seeing the officers, the defendant said that they had caught him and he showed them where the guns were. As the police were checking the serial numbers, he told them he had altered the numbers after reporting the guns stolen. The trial court held the statement inadmissible because *Miranda* warnings had not been given. The supreme court reversed, however, holding the

119. ___ Mont. ___, 606 P.2d 1043 (1979).
120. Townsend v. Sain, 372 U.S. 293, 307 (1963).
121. ___ Mont. ___, 595 P.2d at 1146 (1979).

statements to have been volunteered. Volunteered statements are not brought about by police questioning and are both voluntary and admissible.[122] As the *Miranda* Court had held, "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[123]

2. *Miranda Violations*

Four recent Montana cases deal with *Miranda*-related issues.[124] *Ryan*[125] simply held that volunteered statements are not affected by the requirements of *Miranda;* where police do not question an accused or in any way solicit his statements, the requirements of *Miranda* are not applicable. Both *State v. Dess*[126] and *State v. Grimestad*[127] dealt with the adequacy of the *Miranda* warning given by police. In *Dess* the officers told the defendant, "We have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court."[128] The court recognized a split in authority as to the validity of a warning containing similar language.[129] Those upholding the warning as valid under *Miranda* found that "the only conclusion a defendant given the warning would be justified in reaching was that '. . . since he was clearly entitled to have a lawyer present during the questioning and since no lawyer could be provided, he could not be questioned.' "[130] The Montana court, however, adopted the reasoning of those courts which had held the warning inadequate.[131] Such a warning is "equivocal and ambiguous, informing a defendant of the right to counsel in one breath and telling him counsel cannot be provided in the next."[132] An effective and express explanation of the right to appointed counsel is required by *Miranda.*[133] The court viewed the warning as misleading and confusing and as constituting "a subtle

122. *Id.* at ____, 595 P.2d at 1149.
123. Miranda v. Arizona, 384 U.S. 436, 478 (1966), *quoted in* State v. Ryan, ____ Mont. ____, 595 P.2d 1146, 1149 (1979).
124. State v. Blakney, ____ Mont. ____, 605 P.2d 1093 (1979); State v. Dess, ____ Mont. ____, 602 P.2d 142 (1979); State v. Grimestad, ____ Mont. ____, 598 P.2d 198 (1979); State v. Ryan, ____ Mont. ____, 595 P.2d 1146 (1979).
125. ____ Mont. ____, 595 P.2d 1146 (1979).
126. ____ Mont. ____, 602 P.2d 142 (1979).
127. ____ Mont. ____, 598 P.2d 198 (1979).
128. ____ Mont. ____, 602 P.2d 142, 144 (1979).
129. *Id.* at ____, 602 P.2d at 145.
130. *Id., quoting* Massimo v. United States, 463 F.2d 1171, 1174 (2d Cir. 1972), *cert. denied,* 409 U.S. 1117 (1973).
131. State v. Dess, ____ Mont. ____, 602 P.2d 142, 145 (1979).
132. *Id.*
133. *Id.*

temptation to the unsophisticated indigent to forego the right to counsel."[134]

In *State v. Grimestad,* it was not the language of the warning that was challenged, but rather the manner in which it was given. Officers told the defendant that he was not a suspect, but they had to give the warning to everyone and obtain a waiver as a matter of procedure.[135] This "downplaying of defendant's *Miranda* rights and the continued assurances by the investigating officers that he was not a suspect of a crime" were held to support the trial court's holding that mere lip service was given to the *Miranda* requirements, rather than a meaningful warning.[136] The absence of a proper warning, as well as other improper police conduct, rendered the defendant's statements inadmissible at trial.[137]

State v. Blakney,[138] like *Dess,* resolved a question in Montana upon which authority elsewhere is divided: the Montana court held that a defendant can validly waive the right to counsel even after effectively asserting that right.[139] Waiver of the right to counsel will not be presumed, however, and the state bears a heavy burden to show waiver.[140] In *Blakney,* the court held, the evidence supported a finding of valid waiver after effective assertion of the right to counsel.[141]

3. *Fruit of the Poisonous Tree Doctrine*

Adopting the general rule that "evidence gained as a result of constitutional violation cannot be used to uncover other physical evidence,"[142] the Montana court, in *State v. Allies,* for the first time held that physical evidence obtained as the fruit of an illegally obtained confession is also inadmissible.[143] In *Allies,* the defendant's confession was held to be the result of impermissible police tactics and was declared involuntary. His confession led officers to the location of a pistol used to convict him. The court recognized three general exceptions to the fruit of the poisonous tree doctrine: (1) if the evidence is sufficiently attenuated from the

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134. *Id., quoting* United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972).
135. ___ Mont. ___, 598 P.2d 198, 200 (1979).
136. *Id.* at ___, 598 P.2d at 203.
137. *Id.*
138. ___ Mont. ___, 605 P.2d 1093 (1979).
139. *Id.* at ___, 605 P.2d at 1097.
140. *Id.*
141. *Id.* at ___, 605 P.2d at 1098.
142. State v. Allies, ___ Mont. ___, 606 P.2d 1043, 1052 (1979).
143. *Id.*

constitutional violation so as to remove its primary taint, it will be admissible; (2) if the evidence is obtained from a source independent of the defendant's confession, it will be admissible; or (3) if it is inevitable that the evidence would have been discovered apart from the defendant's confession, it will be admissible.[144] None of the exceptions was found to apply to the facts of *Allies* and both the pistol and the confession were excluded from evidence.

4. *Suppression Hearings and Scope of Review*

The decision of a trial court to admit or suppress a confession is seldom overturned on appeal because the scope of review is limited. Several recent decisions reaffirm what has long been the law in Montana: the issue of voluntariness is a factual issue addressed to the discretion of the trial court.[145] Review by the supreme court is limited to determining whether there is substantial credible evidence supporting the trial court's findings,[146] and the trial court's judgment as to voluntariness will not be reversed on appeal unless it is clearly against the weight of the evidence.[147]

The decision of the trial court following a suppression hearing is, therefore, generally final—a fact which makes the suppression hearing most significant to the outcome of a trial. Several recent decisions have dealt with the procedures to be observed at a suppression hearing.[148] In *Blakney*, MCA § 46-13-301(4), which requires the defendant to prove his confession involuntary, was expressly held to violate due process requirements because it improperly placed the burden of proof in a suppression hearing upon the defendant.[149] Recent Montana and United States Supreme Court decisions clearly require the state to prove the voluntariness of a confession at a suppression hearing by a preponderance of the evidence.[150] In *Dess*, the trial court was reversed and the defendant's confession was suppressed because the state failed

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144. *Id.* at ___, 606 P.2d at 1052-53.

145. State v. Allies, ___ Mont. ___, 606 P.2d 1043, 1050 (1979); State v. Blakney, ___ Mont. ___, 605 P.2d 1093, 1096 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 202 (1979).

146. State v. Allies, ___ Mont. ___, 606 P.2d 1043, 1050 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 203 (1979).

147. State v. Blakney, ___ Mont. ___, 605 P.2d 1093, 1096 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 202 (1979).

148. State v. Blakney, ___ Mont. ___, 605 P.2d 1093 (1979); State v. Dess, ___ Mont. ___, 602 P.2d 142 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198 (1979).

149. ___ Mont. ___, 605 P.2d 1093, 1098 (1979).

150. *Id.*; State v. Dess, ___ Mont. ___, 602 P.2d 142, 144 (1979); State v. Grimestad, ___ Mont. ___, 598 P.2d 198, 203 (1979); State v. Smith, 164 Mont. 334, 338, 523 P.2d 1395, 1397 (1974); Lego v. Twomey, 404 U.S. 477, 486-87 (1972).

to prove voluntariness; in fact, the state failed to present any evidence whatsoever:

> [W]hen the state fails to show that appellant was advised of his *Miranda* rights, that appellant made the statement attributed to him, or any evidence other than appellant had the mental capacity to make a voluntary statement, a finding the state has carried its burden to prove voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned on appeal.[151]

In *Blakney,* the trial court, in reliance on an unconstitutional statute, had clearly and improperly placed the burden of proof of involuntariness on the defendant.[152] Recognizing the error to be federal constitutional error, the Montana court sought to apply the harmless error doctrine: "While not all errors of constitutional magnitude call for reversal, '. . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' "[153] A bare majority of the court found the burden shifting in *Blakney* to have been harmless error beyond a reasonable doubt.[154] Its holding on this point is, however, unsound, relying as it did on a federal circuit decision which dealt with harmless error in the burden of *producing* evidence, rather than the burden of *proof.*[155] The court improperly held that as long as all of the salient facts were aired, the error was harmless.[156] While an airing of all of the salient facts might well negate the harm resulting from error in the order of proof, it does not remedy harm resulting from error in the burden of proof.

III. Jury Instructions

A. *Burden-Shifting Instructions*

There were a number of significant court holdings relating to due process requirements in the context of jury instructions. Most notable was the decision of the United States Supreme Court in *Sandstrom v. Montana.*[157] The Court there held that instructing the jury over defendant's objection that "the law presumes that a

151. ___ Mont. ___, 602 P.2d 142, 144 (1979).
152. ___ Mont. ___, 605 P.2d 1093, 1099 (1979).
153. *Id., quoting* Chapman v. California, 386 U.S. 18, 24 (1967).
154. ___ Mont. ___, 605 P.2d 1093, 1100 (1979).
155. *Id., citing* Rogers v. United States, 330 F.2d 535 (5th Cir. 1964), *cert. denied,* 379 U.S. 916 (1964).
156. ___ Mont. ___, 605 P.2d 1093, 1100 (1979).
157. ___ U.S. ___, 99 S.Ct. 2450 (1979).

person intends the ordinary consequences of his voluntary acts"[158] violated federal due process standards. Since the jury could have interpreted the challenged presumption either as being conclusive[159] or as shifting the burden of persuasion[160] to the defendant, and since either interpretation violated the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, the instruction was unconstitutional.[161] The Court remanded, however, to the Montana Supreme Court for determination as to whether giving the offensive instruction constituted harmless error in the particular context of the defendant's trial.[162] On remand the Montana Supreme Court was unable to determine that the unconstitutional instruction could not have contributed to the jury's verdict convicting defendant of deliberate homicide. Because it could not conclude that giving the instruction was harmless beyond a reasonable doubt,[163]

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158. The presumption invalidated by the Court is statutorily classified as a "disputable presumption" at MCA § 26-1-602(3) (1979).

159. ___ U.S. at ___, 99 S.Ct. at 2456, 2458-59.

160. *Id.* at ___, 99 S.Ct. at 2456, 2459. There are several recent Montana cases in which the Montana Supreme Court has rejected arguments based on the underlying "burden-shifting" concepts that proved successful in *Sandstrom v. Montana*. Defendants making such arguments have generally relied on the principle that a criminal defendant is denied due process of law when the state is not required to prove every element of the crime charged beyond a reasonable doubt as that principle was developed in Mullaney v. Wilbur, 421 U.S. 784 (1975) and in *In re* Winship, 397 U.S. 358 (1970). *See* cases discussed in the survey and State v. Cooper, ___ Mont. ___, 589 P.2d 133 (1979) (state's failure to prove absence of "justifiable use of force" beyond a reasonable doubt did not impermissibly shift the burden of proof to defendant). *Mullaney v. Wilbur* invalidated a rule of Maine law that a defendant must, in order to reduce a homicide to manslaughter, bear the burden of proving by a fair preponderance of the evidence that he acted "in the heat of passion or sudden provocation." The case held that malice, a necessary element of murder, may not be presumed, thereby relieving the state of the burden of proving every element of the crime beyond a reasonable doubt. Similarly, the Supreme Court applied the same principle in *In re Winship* to invalidate a New York statute providing that for a juvenile to be found guilty of an act which would constitute a crime if committed by an adult, the state need prove only guilt by a preponderance of the evidence.

Courts in other jurisdictions have rejected due process challenges to felony-murder statutes based on the burden-shifting principle of *Mullaney* and *Wilbur*, holding contrary to defendants' assertions that a specific intent to kill, premeditation, wilfulness or deliberation, knowledge or other mental state simply are not elements of the applicable statute. *See, e.g.*, State v. Wanrow, 91 Wash.2d 301, 588 P.2d 1320, 1325 (1978); Rodriquez v. State, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977); State v. Swift, 290 N.C. 383, 407, 226 S.E.2d 652, 668 (1976); State v. Nowlin, 244 N.W.2d 596, 604-05 (Iowa 1976); People v. Root, 524 F.2d 195, 198 (9th Cir. 1975); State v. Frezal, 278 So.2d 64, 67-68 (La. 1973).

161. ___ U.S. at ___, 99 S.Ct. at 2459-60.

162. *Id.* at ___, 99 S.Ct. at 2461.

163. State v. Sandstrom, ___ Mont. ___, 603 P.2d 244, 245 (1979). The Montana court applied the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) and declared that "[b]efore a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." State v. Sand-

the Montana court remanded to district court for retrial.

In *State v. Coleman*,[164] however, the court came to the opposite conclusion. The Montana Supreme Court there considered whether an instruction given at defendant's trial was sufficiently similar to the instruction found constitutionally invalid in *Sandstrom v. Montana*[165] as to require reversal of the defendant's conviction for deliberate homicide. The court held that the instruction was constitutionally sound. The jury had been instructed that it might infer that if it found that the defendant had indeed committed a homicide it could infer that the homicide was committed knowingly or purposely. Unlike the mandatory instruction condemned by the United States Supreme Court in *Sandstrom*, the instruction in *Coleman* was permissive in nature.[166] The Montana court found that it did not have the effect of shifting some of the prosecutor's burden of proof to defendant.[167] Invoking the doctrine that the instructions had to be viewed as a whole, the court noted that the jury had been amply instructed on the state's burden of proof beyond a reasonable doubt and on the defendant's presumption of innocence.[168] Furthermore, in the court's view, the contested instruction had to be interpreted together with the "circumstantial evidence" instruction given to the jury.[169] The latter instruction informed the jury that since all the evidence against the defendant was circumstantial, to support a verdict of guilty the evidence not only had to be consistent with defendant's guilt, but also inconsistent with any reasonable hypothesis of his innocence.[170] The court concluded that this circumstantial evidence instruction together with the permissive language in the disputed instruction effectively instructed the jury that any inference of mental state based on the challenged instruction would be insufficient unless it was inconsistent with any hypothesis other than guilt.[171] Whereas *Sandstrom* related to a presumption of *law*, the *Coleman* instruction referred only to an inference of *fact*, which by its terms was not unreasonable.[172] In *State v. Williams*,[173] the Montana Supreme Court rejected another argument based on the

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strom, ___ Mont. ___, 603 P.2d 244, 245 (1979).

164. ___ Mont. ___, 605 P.2d 1000 (1979).
165. ___ U.S. ___, 99 S.Ct. 2450 (1979).
166. ___ Mont. at ___, 605 P.2d at 1052-54.
167. *Id.* at ___, 605 P.2d at 1054.
168. *Id.* at ___, 605 P.2d at 1053-54.
169. *Id.* at ___, 605 P.2d at 1053.
170. *Id.*
171. *Id.*
172. *Id.* at ___, 605 P.2d at 1052.
173. ___ Mont. ___, 604 P.2d 1224 (1979).

burden-shifting rationale of *Sandstrom*. An instruction to the jury that it could infer purpose or knowledge from "acts, conduct, or circumstances" appearing in evidence was held not to shift the burden of proof of mental state from the state to the defendant in violation of the principles set forth in *Sandstrom v. Montana*.[174] The basis for the infirmity of the instruction in *Sandstrom*, the court explained, was that the jurors were *not* told that they had a choice or that they might infer that the defendant had acted with intent.[175] Instead they were told that the law presumed intent.[176] The Montana court reaffirmed the proposition that it is permissible to draw usual reasonable inferences from overt acts.[177]

The court rejected a similar argument in *State v. Coleman*.[178] Defense counsel had urged that a jury instruction on the mental state "knowingly" phrased in the statutory language[179] intruded on the fact-finding function of the jury. Defendant claimed (1) that the instruction violated the standard of proof beyond a reasonable doubt since it required only proof of defendant's awareness of the results of his conduct "to a high probability," (2) that the instruction in effect embodied a conclusive presumption that a mental state is established if the jury found a high probability of its existence, and (3) that the statutory standard of "high probability" lacks "the quality which would enable the jury to convict."[180] In disposing of these arguments, the court held in effect that the contested instruction was not an instruction on the state's burden of proof, but rather a substantive statutory definition of a criminally culpable mental state.[181] The jury was not told that the state needed only to prove the existence of the mental state "knowingly" to a "high probability" instead of beyond a reasonable doubt.[182] Rather, the jury was instructed that the mental state was established if it found beyond a reasonable doubt that the defendant was aware of a substantial likelihood that his conduct could produce a forbidden result.[183]

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174. *Id.* at ___, 604 P.2d at 1232.
175. *Id.*
176. *Id.*
177. *Id., quoting* Cramer v. United States, 325 U.S. 1, 31 (1945).
178. ___ Mont. ___, 605 P.2d 1000 (1979).
179. MCA § 45-2-101(27) (1979).
180. ___ Mont. ___, 605 P.2d at 1054 (1979).
181. *Id.* at ___, 605 P.2d at 1055.
182. *Id.*
183. *Id.*

B. *Presumption of Innocence Instruction*

In the recent case of *State v. Williams*,[184] the Montana Supreme Court held that the defendant was entitled upon request to an instruction as to the presumption of innocence even though the jury was properly instructed as to the burden of proof beyond a reasonable doubt.[185] Failure to give the instruction after defendant had requested it constituted per se reversible error. In so holding, the Montana court followed prior Montana case law which had established an absolute rule[186] and expressly declined to follow United States Supreme Court holdings which establish a "totality of the circumstances" test to determine whether denial of a requested presumption of innocence instruction constitutes reversible error.[187] The Montana court grounded its decision on two considerations. First, it stated that Montana has historically set higher standards than the federal courts.[188] Second, it asserted that application of the federal "totality of the circumstances" test would necessarily require the trial judge to pass on both the quality and the quantity of the evidence presented.[189] Such an evaluation by the trial court would usurp the jury's role as fact finder.[190] That usurpation, in the court's view, would amount to a partial denial of defendant's right to a trial by jury as guaranteed by the state and federal constitutions.[191]

IV. PUBLICITY

A. *Introduction*

Concern for the integrity of the decision-making function of

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184. ___ Mont. ___, 601 P.2d 1194 (1979).

185. *Id.* at ___, 601 P.2d at 1195.

186. State v. Howell, 26 Mont. 3, 5, 66 P. 291, 292 (1901); State v. Harrison, 23 Mont. 79, 57 P. 647 (1899).

187. Kentucky v. Wharton, ___ U.S. ___, 99 S.Ct. 2088 (1979); Taylor v. Kentucky, 436 U.S. 478 (1978). In *Kentucky v. Wharton*, the United States Supreme Court held that failure of the trial court to give a requested jury instruction on the presumption of innocence does not in and of itself violate the due process requirement of the Fourteenth Amendment:

> Under Taylor [v. Kentucky] such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and other relevant factors—to determine whether the defendant received a constitutionally fair trial.

___ U.S. ___, 99 S.Ct. at 2090.

188. ___ Mont. ___, 601 P.2d at 1196.

189. *Id.*

190. *Id.*

191. *Id.*

the jury at all stages of the trial process—at pretrial suppression hearings, at trial and in the instructions of the jury—was a recurrent theme in recent Montana and United States Supreme Court cases. The "jury instruction" cases sought to insure that the jury's fact-finding process would not be compromised by erroneous instructions of law. The cases considered in this section reflect a concern that the impartiality of the jury function will not be tainted by prejudicial publicity arising either before or during trial. The effect of adverse publicity on the defendant's fair trial right and the judicial remedies available to vindicate that right are the central issues in publicity cases.

The right of the accused to a fair trial in a criminal prosecution is vouchsafed by the Sixth Amendment[192] to the federal constitution and by Article II, Section 24 of the Montana Constitution of 1972. The United States Supreme Court has deemed the right to a fair trial "the most fundamental of all freedoms."[193] The failure to accord the accused a fair trial by a panel of impartial jurors violates even the minimum requirements of due process.[194] The principle of fairness does not mandate a perfect trial.[195] It does, however, require "an absence of actual bias in the trial of cases."[196] Moreover, the United States Supreme Court has consistently held that "our system of law has endeavored to prevent even the *probability* of unfairness."[197] In some instances, changing the place of trial may be the only remedy "sufficient to assure the kind of impartial jury guaranteed by the Fourteenth Amendment."[198]

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192. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The United States Supreme Court has held that the due process clause of the Fourteenth Amendment guarantees a right of jury trial in state criminal cases. Duncan v. Louisiana, 391 U.S. 145, 149 (1968), *reh. denied*, 392 U.S. 947 (1968). Similarly, sections 17 and 24 of Article II of the 1972 Montana Constitution provide, respectively, that "[n]o person shall be deprived of life, liberty or property without due process of law," and that "[i]n all criminal prosecutions the accused shall have the right . . . to have . . . a speedy trial by an impartial jury . . . ."

193. Estes v. Texas, 381 U.S. 532, 540 (1965).

194. Irvin v. Dowd, 366 U.S. 717, 722 (1960). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Id.*

195. Bruton v. United States, 391 U.S. 123, 135 (1968).

196. *In re* Murchison, 349 U.S. 133, 136 (1955).

197. Estes v. Texas, 381 U.S. 532, 543 (1965) (emphasis added).

198. Groppi v. Wisconsin, 400 U.S. 505, 510-11 (1971).

B. *Pretrial and Mid-Trial Publicity*

Confronted with the dangers of adverse publicity affecting the trial, the courts usually adopt one of three remedies: (1) postponement of the trial to allow the fires of public passion to subside; (2) "searching" voir dire of the jurors to eradicate prejudice; and (3) "a change of venue to a community less exposed to the intense publicity."[199] In Montana only the second remedy is employed

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199. Fahringer, *Charting a Course from the Free Press to a Fair Trial,* 12 SUFFOLK U.L. REV. 1, 9 (1978) [hereinafter cited as Fahringer]. There are, of course, other potential remedies for adverse publicity. They include in appropriate cases, waiver of a jury trial, sequestration of the jury, gag orders, exclusion of the press and public from all or part of the proceedings. *See generally* Ranney, *Remedies for Prejudicial Publicity: A Brief Review,* 21 U. VILL. L. REV. 819 (1976) [hereinafter cited as Ranney]; Ferber, *Beating Bad Press: Protecting the California Criminal Defendant from Adverse Publicity,* 10 U.S.F. L. REV. 391 (1976); Note, *Judicial Control of Pretrial and Trial Publicity: A Reexamination of the Applicable Constitutional Standards,* 6 GOLDEN GATE L. REV. 101 (1975).

The place of trial in a criminal prosecution is generally the county where the alleged offense was committed. MONT. CONST. art. II, § 24; MCA § 46-3-101(1) (1979). This general rule is subject to one exception. MCA § 46-13-203 (1979) provides that the defendant or prosecution can move for a change of place of trial at least fifteen days prior to trial if such a degree of prejudice prevails in the county where the offense was committed as would preclude a fair trial for the defendant. The statute further provides that the motion be made in writing and be supported by affidavits "which shall state facts showing the nature of the prejudice alleged." Thereafter the court must conduct an evidentiary hearing to determine the merits of the affidavits. MCA §§ 46-13-203(2), -3-101(2) (1979).

The legal requisites of a continuance of trial because of the furor caused by prejudicial publicity are set forth in MCA § 46-13-202 (1979). That statute provides that "motions for continuance are addressed to the discretion of the trial court and shall be considered in light of the diligence shown on the part of the movant." MCA § 46-13-202(3) (1979). The court may require the motion to be supported by affidavit, MCA § 46-13-202(1) (1979), and may grant the motion "if the interests of justice so require." MCA § 46-13-202(2) (1979). The statute itself seems to militate against a liberal policy of granting continuances: it provides that the statute "shall be construed to the end that criminal cases are tried with the rights of the defendant and the state to a speedy trial." MCA § 46-13-202(3) (1979). Case law has imposed stricter requirements on motions for postponement of trial in order to procure missing evidence. It is not clear whether those requirements would be construed to apply to continuances due to prejudicial publicity as well. In contradistinction to MCA § 46-13-202(1) (1979), which permits the trial judge in his discretion to require affidavits in support of the motion, MCA § 25-4-501 (1979) mandates affidavits to support a motion for a continuance to procure additional evidence. Although the statute is contained in Title 25 dealing with civil procedure, it was held very early in Territory v. Perkins, 2 Mont. 467, 470 (1876) that similar provisions of the Territorial Civil Procedure Act relating to postponement of trial in civil actions were equally applicable to criminal cases. Ever since that holding, Montana criminal cases considering the conditions under which a continuance will be granted have relied on statutes similar to the ones invoked in *Perkins* or on case law traceable to the holding in *Perkins. See, e.g.,* State v. Pascgo, 173 Mont. 121, 124, 566 P.2d 802, 804 (1977), *relying on* R.C.M. 1947, § 94-1708, the predecessor to MCA § 25-4-501 (1979); State v. Moorman, 133 Mont. 148, 156-57, 321 P.2d 236, 241 (1957); State v. Metcalf, 17 Mont. 417, 423-24, 43 P. 182, 184 (1896); State v. Gibbs, 10 Mont. 213, 217-18, 25 P. 289, 290 (1890). It is at least remotely possible that by a process of analogy the civil statutes governing motions for continuance, MCA §§ 25-4-501 through 504 (1979), could be construed (1) to mandate affidavits upon motions for postponement of trial for any purpose and (2) to apply generally

with any regularity.[200] Two Montana cases decided during the survey period dealt directly or indirectly with all three of these remedies to prejudicial pretrial publicity. In addition the Montana Supreme Court decided for the first time what remedy was appropriate to cure the effects of adverse publicity which arises after the accused's trial has commenced.

While arguably reaching just results under the factual situations presented for review, two recent Montana cases are nevertheless illustrative of the general judicial reluctance to grant affirmative judicial relief to cure the effects of prejudicial pretrial and mid-trial publicity.[201] In *State v. Kirkland*[202] the Montana Supreme Court upheld a conviction of aggravated assault against defendant's assertion that the trial court had erred in not allowing him to interrogate members of the jury concerning their exposure to allegedly inflammatory and prejudicial news releases. Two of the allegedly prejudicial news stories were made public on the day before trial. The third was broadcast by a local television station on the first day of trial. All of the news releases, both in the press and on television, depicted the accused as a paid assassin.

Having never decided the issue, the court first considered what action a trial judge must take when prejudicial news releases are brought to his attention. The court refused to adopt the rule followed by some federal and state courts requiring the trial judge to examine the jurors to determine whether any of them had read the prejudicial news release and to assess the effects of the publicity.[203] Indeed the court refused to impose any specific procedures on the lower court at all, preferring to leave the matter "to the trial judge's judgment and discretion . . . subject to . . . review on appeal."[204] The court advanced several reasons for this approach: (1) a mandatory requirement of an immediate examination of the jury would be an inflexible standard and would destroy the trial judge's discretionary control over the proceedings; (2) a mandatory rule might inject error into the trial where none had existed before; (3) defense counsel might abuse the rule to disrupt the trial or to

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in criminal cases.

200. *See notes* 222-30 and accompanying text *infra*.

201. The Montana Supreme Court has overturned a trial court's denial of a defendant's motion for change of venue in only two cases: *See* State v. Dryman, 127 Mont. 579, 269 P.2d 796 (1954); State v. Spotted Hawk, 22 Mont. 33, 55 P. 1026 (1899). *See generally* Note, *Criminal Law: Extensive Publicity May Prevent a Fair Trial*, 27 MONT. L. REV. 205, 208 (1965).

202. ___ Mont. ___, 602 P.2d 586 (1979).

203. *Id.* at ___, 602 P.2d at 593.

204. *Id.*

distract the jurors; (4) the need for a per se rule is questionable since the defense can request a poll of the jury after its verdict or can subpoena jurors on motion for a new trial to show that the jurors had knowledge of the prejudicial publicity; and (5) on appeal the ruling of the trial judge is subject to review.[205]

There are three principle difficulties with the court's rationale. First, some of the enumerated justifications for the court's discretionary approach are highly speculative in nature. Second, the court formulates no guidelines to inform the exercise of the trial judge's discretion in dealing with mid-trial publicity. The biggest problem is, however, the court's emphasis on a post-trial appellate remedy. In practical terms the result may well be no real remedy at all, given the deferential standard of review generally applied by courts in reviewing prejudicial publicity issues.

Appellate courts in Montana and elsewhere, for example, follow the well established rule that granting or refusing a change of venue requested by defendant as a cure for prejudicial publicity is within the "sound discretion" of the trial court.[206] A clear showing of abuse of discretion by the trial court in denying a change of venue is required to support a reversal.[207] Applying the same "abuse of discretion" standard of review to the mid-trial publicity issue in this case, the supreme court held that the trial judge had not erred in denying defense counsel's request to examine the jury.[208] In so holding the court placed considerable emphasis on the fact that at the time of voir dire defense counsel had knowledge of a media attempt to brand his client as a hired killer, that he had been permitted to voir dire the prospective jurors on their knowledge of press reports of the case, that the selected jurors indicated they had not been influenced by media reports and that they would render a verdict based solely on the evidence.[209] As discussed below,[210] even after juror exposure to prejudicial publicity, defense counsel's opportunity to examine the jury on voir dire is almost invariably regarded by appellate courts as a satisfactory remedy.

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205. *Id.*

206. State v. Hoffman, 94 Mont. 573, 580, 23 P.2d 972, 974 (1933); State v. Davis, 60 Mont. 426, 431, 199 P. 421, 422 (1921). *See generally* Ranney, *supra* note 199, at 830.

207. State v. Lewis, 169 Mont. 290, 295, 546 P.2d 518, 521 (1976); State v. Logan, 156 Mont. 48, 58, 473 P.2d 833, 838 (1970).

208. ___ Mont. ___, 602 P.2d at 593-94.

209. *Id.* at ___, 602 P.2d at 594. The supreme court in *Kirkland* also found that the news release broadcast after voir dire in no way prejudiced the accused since it contained the same information as the two news reports made public before trial.

210. *See* notes 222-30 and accompanying text *infra*.

In *State v. Williams*[211] the Montana court held that defendant's motions for a change of venue and, alternatively, for a continuance due to allegedly prejudicial pretrial publicity were properly denied by the trial court where on voir dire only three of the twelve jurors could recall having heard anything about the case and they remembered only the defendant's unusual first name or that a gas station had been robbed.[212] The court also noted that one juror had not been asked any questions during voir dire.[213] Under these circumstances there was no showing that the defendant was denied a fair trial by a panel of impartial jurors as the accused contended.[214] In upholding the denial of motions for a change of venue or continuance, the supreme court stated that the decision to grant either motion was within the discretion of the trial court.[215] Absent a clear abuse of discretion a trial court denial of a motion for change of the place of trial would not be disturbed.[216] Similarly, the court stated that a denial of a motion for a continuance until the fervor of the publicity had died down would not be granted without a showing of prejudice to the movant.[217] The court specified neither the scope of allowable judicial discretion nor the quantum of prejudicial pretrial publicity requisite for either a change of venue or a continuance.

As has often been pointed out by commentators, "the whole area of prejudicial publicity has not lent itself to many clear cut rules, being somewhat amorphous in terms of defining the problem and in terms of devising appropriate remedies."[218] Usually the courts make no attempt to systematically define the precise criteria which should inform the "sound discretion" of the trial court. Nevertheless, the Montana court has stated that the following factors are indicative of a denial of an accused's rights to a fair trial due to pretrial publicity: the aroused feelings of the community, a threat to the defendant's personal safety, community opinions regarding the defendant's guilt, and slanted news articles.[219] Although case law offers no reliable guide as to how the presence of these factors may be proven or what constitutes sufficient proof,

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211. ___ Mont. ___, 604 P.2d 1224 (1979).
212. *Id.* at ___, 604 P.2d at 1227.
213. *Id.*
214. *Id.* at ___, 604 P.2d at 1226-28.
215. Id. at ___, 604 P.2d at 1226-27. *See also* MCA § 46-13-202(3) (1979) (motions for continuance are addressed to trial court's discretion).
216. *Id.* at ___, 604 P.2d at 1226; *see* notes 206 and 207 and accompanying text *supra.*
217. Williams, ___ Mont. ___, 604 P.2d at 1226-27.
218. Ranney, *supra* note 8, at 819-20.
219. State v. Board, 135 Mont. 139, 143, 337 P.2d 924, 927 (1959).

the Montana cases do make clear that pretrial publicity in and of itself does not justify a change of venue. Additional evidence must be presented to show that publicity was so prejudicial as to prevent the accused from receiving an impartial trial.[220] It also appears to be well settled in Montana that mere publication of a news story concerning a crime is neither a deprivation of a constitutional right nor a ground for change of venue; the affidavits must show passion and prejudice flowing from the publications.[221]

The court may justify a denial of change of venue by emphasizing the relative ease with which the jury was selected.[222] In *State v. Hoffman*,[223] for example, the court found the fact that few talesmen had to be examined in order to form a jury was persuasive in overcoming the charge that the trial court abused its discretion in refusing to change the place of trial.[224] Similarly, the court has held that the trial court's refusal to grant a venue change was not improper where the trial judge performed an individual voir dire examination as to each juror's knowledge of the case and received each juror's assurance that he or she could render an impartial verdict based solely on the evidence presented.[225] A related factor considered by the supreme court was the extent of the prospective jurors' familiarity with the publicity and its effect upon them, as shown by their answers on voir dire.[226] Other factors include the extent to which defense counsel has utilized his peremptory challenges[227] or challenges for cause.[228] In *State v. Corliss*[229] the court considered it significant, although not dispositive, that all but two of the witnesses who testified expressed the opinion that the defendant could obtain a fair trial in the county.[230]

By statute, motions for a change of venue must be accompanied by a supporting affidavit.[231] The court has repeatedly rejected as insufficient supporting affidavits, circulated petitions, or public

220. State v. Stewart, 151 Mont. 551, 555-56, 445 P.2d 741, 744 (1968); State v. Bess, 60 Mont. 558, 569, 199 P. 426, 429 (1921).

221. State v. Corliss, 150 Mont. 40, 49, 430 P.2d 632, 637 (1967), *cert. denied*, 390 U.S. 691 (1968); Hanrahan v. District Court, 145 Mont. 501, 507-08, 401 P.2d 770, 774 (1965).

222. State v. Stewart, 151 Mont. 551, 556, 445 P.2d 741, 744 (1968).

223. 94 Mont. 573, 23 P.2d 972 (1933).

224. *Id.* at 580, 23 P.2d at 974.

225. *See, e.g.*, State v. Buckley, 171 Mont. 238, 246, 557 P.2d 283, 287 (1976).

226. State v. Corliss, 150 Mont. 40, 49, 430 P.2d 632, 637 (1967), *cert. denied*, 390 U.S. 961 (1968) (only one of the forty-six veniremen examined admitted having formed an opinion regarding defendant's guilt or innocence).

227. *Id.* at ___, 430 P.2d at 638.

228. State v. Bess, 60 Mont. 558, 569, 199 P. 426, 429 (1921).

229. 150 Mont. 40, 430 P.2d 632 (1967), *cert. denied*, 390 U.S. 961 (1968).

230. *Id.* at 49, 430 P.2d at 637.

231. MCA § 46-13-203(2) (1979).

opinion polls which recite in conclusory fashion that the defendant cannot receive a fair trial in the county due to public prejudice against him.[232] In the court's words, "[The affidavit] ought to state facts so that the court, not the witnesses, may determine whether the community is prejudiced."[233] The affidavits must show "passion" and "prejudice" flowing from the publications.[234]

Both the continuance and the "searching" voir dire remedies are often unsatisfactory.[235] Continuance of the trial merely postpones the harm. Although the impact of bad publicity may wane with the passage of time, the memory is quickly revived when the trial takes place.[236] At least one court has held that granting a change of venue is preferable to a continuance since it preserves rather than erodes the accused's constitutional right to a speedy trial.[237] Similarly, the United States Supreme Court has criticized the continuance as working "against the important values implicit in the constitutional guarantee of a speedy trial."[238] The "searching" voir dire so heavily relied upon in Montana has been condemned as "the most impractical and hypocritical of the solutions for dealing with this quandary and should be abandoned as a remedy for prejudicial pretrial publicity."[239] First, it causes courts to downplay other means of assuring a fair trial. Second, it is ineffective in uncovering prejudice because of a "lack of candor on the part of most jurors."[240] Third, voir dire involves the additional risk that inflammatory remarks by one juror will poison the attitudes of others.[241] Even when voir dire is conducted in isolation, there is a danger that jurors in the assembly areas will be influenced by the remarks of those influenced by unfriendly publicity.[242] Prejudice

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232. *See, e.g.*, State v. Lewis, 169 Mont. 290, 296, 546 P.2d 518, 521 (1976); State v. Davis, 60 Mont. 426, 431, 199 P. 421, 422 (1921); Note, *Criminal Law: Extensive Publicity May Prevent a Fair Trial*, 27 MONT. L. REV. 205, 209 n.29 (1965). Recitals of what lay persons think other people are thinking are regarded as having little weight in deciding whether a change of venue should be granted. State v. Bischert, 131 Mont. 152, 157, 308 P.2d 969, 971 (1957); State v. Warrick, 152 Mont. 94, 102, 446 P.2d 916, 921 (1960).

233. Territory v. Manton, 8 Mont. 95, 103 P. 387, 390 (1888). For the kinds of factual evidence that should be included in supporting affidavits or which should be offered at an evidentiary hearing on this issue, *see generally* AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE § 256 (3d ed. 1974).

234. Hanrahan v. District Court, 145 Mont. 501, 507-08, 401 P.2d 770, 774 (1965).

235. Fahringer, *supra* note 199, at 9.

236. *Id.*

237. Commonwealth v. Casper, 375 A.2d 737, 742-43 (Pa. Super. 1977).

238. Gropp v. Wisconsin, 400 U.S. 505, 510 (1971).

239. Fahringer, *supra* note 199, at 11; *see also* Irwin v. Dowd, 366 U.S. 717, 726-27 (1961).

240. Fahringer, *supra* note 199, at 10.

241. *Id.* at 11.

242. *Id.*

once lodged in the mind of a juror is not readily exorcised by ritualistic application of traditional ceremonies and formalities. Chief Justice Hughes once wrote: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no formula."[243]

The United States Supreme Court has acted to protect criminal defendants against the strong probability of prejudice. In *Rideau v. Louisiana*,[244] the Court did not require a showing of actual prejudice to the defendant via voir dire examination of jurors in holding that a state court's refusal to grant a change of venue made a fair trial impossible. Prior to trial, local television broadcasted an interview in which the accused confessed to murder, robbery, and kidnapping. Stating that in a very real sense the televised spectacle *was* the defendant's trial,[245] the Court held that, "without pausing to examine a particularized transcript of the voir dire examination of members of the jury," due process required a jury drawn from a community which had not been exposed to the televised confession.[246] The Court *presumed* prejudice to the accused from the nature and extent of the pretrial publicity.[247]

The importance of protecting against a "probability of unfairness"[248] is reflected in the ABA Standards relating to fair trial and free press. They urge that a motion for a change of venue be granted whenever the trial court determines that the dissemination of potentially prejudicial material has created a reasonable likelihood that a fair trial cannot be had.[249] The court's determination must be based on qualified public opinion surveys, opinion testimony, or on the court's own evaluation of the nature, frequency, and timing of the disseminated materials. The standards expressly state that a showing of actual prejudice shall not be required.[250]

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243. United States v. Wood, 299 U.S. 123, 145-46 (1936).

244. 373 U.S. 723 (1963).

245. *Id.* at 726.

246. *Id.* at 727.

247. A persuasive factor in the Supreme Court's holding was the relatively small size of the community in which the pretrial publicity was disseminated—a situation in which voir dire is an ineffective remedy due to the high probability that most potential jurors have not escaped exposure to the unfriendly news. Small, rural, and relatively homogenous communities are the norm in Montana. In the interest of preserving the defendant's constitutionally guaranteed right to a fair trial, the *Rideau* rationale could well have been urged on the court in *State v. Williams*. Prejudice to the defendant—or at least a high probability of it—could perforce have been presumed.

248. Estes v. Texas, 381 U.S. 532, 540 (1965).

249. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.2(c) (1974) [hereinafter cited as ABA STANDARDS].

250. *Id.*

C. *Exclusion of Press from Pretrial Suppression Hearings*

Exclusion of the public and the press from pretrial proceedings is yet another remedy for adverse publicity. Although there is a significant danger that publicity during trial may prejudice the accused's right to a fair trial by an unbiased jury,[251] the danger is most urgent in the context of such pretrial proceedings as preliminary examinations and suppression hearings. Media coverage of inadmissible, inculpatory evidence discussed at a suppression hearing could threaten the empanelling of a constitutionally impartial jury. Plainly, the defendant's right to a public trial may perforce run counter to the purposes of his fair trial right. Furthermore, a request for exclusion precipitates an ostensible conflict between the accused's right to a fair trial and the purported right of public access to criminal proceedings under the First,[252] Sixth, and Fourteenth Amendments.

A recent United States Supreme Court case addressed but unfortunately failed to resolve some of these issues. Last term in *Gannett Co. v. DePasquale*,[253] a decision loudly decried by the press, the Supreme Court held that neither the Sixth nor the Fourteenth Amendment prevented the closure of pretrial suppression

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251. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

252. In 1970 the American Bar Association adopted standards in response to the Warren Commission Report regarding the fair trial-free press dilemma in criminal cases that become the focus of large amounts of publicity. The ABA completed two studies which comment on the Warren Report: ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, THE RIGHTS OF FAIR TRIAL AND FREE PRESS (1969), the so-called REARDON REPORT; and SPECIAL COMM. ON RADIO, TELEVISION AND THE ADMIN. OF JUSTICE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL: FINAL REPORT WITH RECOMMENDATIONS (1967). Both sought a balance between the flow of information from the press to the public and the maintenance of integrity protecting the constitutional rights of the accused. The following resources analyze the fair trial-free press conflict: SHOEMAKER, CONSTITUTIONAL CONFLICT AND FREE PRESS-FAIR TRIAL (1972); Merrill, *The "People's Right to Know" Myth*, 45 N.Y. ST. B. J. 461 (1973); Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1 (1975); Comment, *Free Press v. Fair Trial: Insulation Against Injustice*, 33 LA. L. REV. 547 (1972-73); Comment, *Fair Trial and Free Press: Preliminary Hearing—Gateway to Prejudice*, LAW & SOC. ORDER 903 (1973); Comment, *Free Press v. Fair Trial: A Constitutional Dichotomy*, 20 LOYOLA L. REV. 148 (1973-74); Comment, *Procedural Compromise and Contempt: Feasible Alternatives in the Fair Trial Versus Free Press Controversy*, 22 U. FLA. L. REV. 650 (1969-70).

To date the Supreme Court has held that the newsgathering rights of the public and of the press under the First Amendment are coextensive. *See* Pell v. Procunier, 417 U.S. 817, 833-34 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972). The Court has not yet ruled definitively on whether or not the First Amendment grants a public right of access to information in government control. It would appear that no constitutional provision affirmatively grants the institutional press greater rights than accorded the public generally.

253. ___ U.S. ___, 99 S.Ct. 2898 (1979).

hearings where a public proceeding would have jeopardized the right of criminal defendants to a fair trial and where both the court and the prosecution consented to the defendants' request for exclusion of the public. The defendants, charged with second-degree robbery, murder, and grand larceny in a state prosecution, requested that the public and the press be excluded from the hearing, arguing that adverse publicity endangered their right to a fair trial. Subsequently, a newspaper challenged the closure order on First, Sixth, and Fourteenth Amendment grounds. Although the Court held in *Nebraska Press Association v. Stuart*[254] that prior restraints on publicity concerning judicial proceedings were presumptively invalid as a means of protecting the right of a criminal defendant to a fair trial, it specifically declined to decide whether a trial court could close the trial to safeguard that right.[255] Due to the opinion's ambiguity and the fragmentation of the Court, *Gannett* does not, however, unequivocally resolve the question.

Justice Stewart's majority opinion rested the Court's holding on "two independently sufficient [rationales] with vastly different implications."[256] An analysis of the common-law history and nature of the public's interest in public trials led Justice Stewart to conclude that even though strong societal interests in public trials and publicity do exist,[257] the public's independent interest in enforcing the Sixth Amendment's public trial guarantee is not tantamount to a constitutional right of the public to do so.[258] He concluded that the specific language of the Sixth Amendment that *"the accused* shall enjoy the right to a . . . public trial by an impartial jury," implied that the right was personal to the accused.[259] Moreover, he maintained that both the Constitution and history were devoid of any evidence of an independent public right of access to a criminal trial.[260] Stewart's second argument was that even if the Sixth and Fourteenth Amendments did create a public right of access to criminal trials, the right would not extend to pretrial hearings. For, he reasoned, there was no right at common law to attend pretrial proceedings,[261] and at the time of the adoption of the Constitution public trials were clearly associated with the pro-

254. 427 U.S. 539 (1976).
255. *Id.* at 564 n.8.
256. Note, 93 HARV. L. REV. 1, 63 (1979).
257. ___ U.S. ___, 99 S.Ct. at 2907.
258. *Id.* at ___, 99 S.Ct. at 2907-09.
259. *Id.* at ___, 99 S.Ct. at 2905.
260. *Id.*
261. *Id.* at ___, 99 S.Ct. at 2909.

tection of the defendant.[262] This conclusion was also compelled by the purpose of the suppression hearing which is to screen out unreliable evidence and insure that it does not become known to the jury.[263] That purpose could be frustrated if press reports about inculpatory but inadmissible evidence considered at the suppression hearings reached the public.

Petitioner also urged that the First Amendment granted the press a right of access to criminal proceedings. With two concurrences, one supporting and one rejecting the argument, the majority opinion initially skirted the issue by stating "even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this spectative right was given all appropriate deference by the state *nisi prius* court in the present case."[264] The majority opinion stated further that the "trial court balanced the 'constitutional rights of the press and the public' against the 'defendant's right to a fair trial.' "[265] While that language suggests that the majority recognized a First Amendment right, the majority opinion subsequently claimed to have held that no such right exists:

> [W]e are asked to hold that the Constitution itself gave the petitioner an affirmative right of access to this pretrial proceeding, even though all of the participants in the litigation agreed that it should be closed to protect the fair trial rights of the defendants.
>
> For all of the reasons discussed in this opinion, *we hold that the Constitution provides no such right.*[266]

Chief Justice Burger and Justices Powell and Rehnquist while joining the majority opinion each wrote separate concurring opinions. Chief Justice Burger ostensibly dissociated himself from the majority's pronouncement that the public had no right of access to criminal trials generally by emphasizing that the dispositive feature of the case was the pretrial nature of the proceedings in question.[267] Although agreeing with the majority's interpretation of the Sixth Amendment, Justice Powell concluded that the public has a right of access to both trials and pretrial hearings under the First Amendment[268] and advocated a case-by-case balancing of the con-

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262. *Id.*
263. *Id.* at ____, 99 S.Ct. 2904-05, 2911.
264. *Id.* at ____, 99 S.Ct. at 2912.
265. *Id.*
266. *Id.* at ____, 99 S.Ct. at 2913 (emphasis added).
267. *Id.* at ____, 99 S.Ct. at 2913 (Burger, C.J., concurring).
268. *Id.* at ____, 99 S.Ct. at 2914 (Powell, J., concurring).

flicting rights of the public and the defendant.[269] Justice Rehnquist sought to expand the rationale underlying the majority opinion.[270] He maintained that the Court had repeatedly and clearly held that "there is no First Amendment right of access in the public or press to judicial or other governmental proceedings."[271] In his view, the First Amendment was not a sort of constitutional "sunshine law."[272] Accordingly, a defendant seeking closure need show no harm, nor need a trial judge show harm to justify closure.[273] Justice Blackmun argued in dissent that under the Sixth Amendment the public had a right to attend criminal proceedings generally[274] and that closure could be valid only if "strictly and inescapably" necessary.[275] Looking to history and policy considerations, he concluded that recognition of such a public right was essential to protect society's interest in the integrity of the judicial system.[276]

The division of the justices in *Gannett* has engendered widespread uncertainty among lower courts over what the Court held. As one commentator has pointed out, the confusion is due in no small measure to Justice Stewart's alternate Sixth Amendment analyses which leave unclear whether the holding permits closure of trials or only pretrial hearings.[277] Several members of the Court have made extrajudicial statements to clarify the meaning of *Gannett* but have only succeeded in exacerbating the controversy surrounding the case by projecting their disagreements into a public forum.[278] State trial courts have invoked *Gannett* to justify the closing of whole trials and to close proceedings over the prosecutor's objections.[279] Not only did the Court's widely divided decision

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269. *Id.* at ____, 99 S.Ct. at 2916 (Powell, J., concurring).
270. *Id.* at ____, 99 S.Ct. at 2918-19 (Rehnquist, J., concurring).
271. *Id.* at ____, 99 S.Ct. at 2918 (Rehnquist, J., concurring).
272. *Id.*
273. *Id.*
274. *Id.* at ____, 99 S.Ct. at 2922-41 (Blackmun, J., concurring).
275. *Id.* at ____, 99 S.Ct. at 2936 (Blackmun, J., concurring).
276. *Id.* at ____, 99 S.Ct. at 2930-31 (Blackmun, J., concurring).
277. *See generally* Note, 93 HARV. L. REV. 1, 65-66, 66 n.37 (1979).
278. *Id.* at 65, 65 n.32.
279. *Id.* at 65. In Richmond Newspapers, Inc. v. Virginia, Civil No. 78-1598 (Va., filed Nov. 8, 1978), the Virginia Supreme Court, relying on Gannett v. DePasquale, ____ U.S. ____, 99 S.Ct. 2898 (1979) dismissed an appeal by a newspaper and reporters from an order excluding press and public from the courtroom in a capital murder case. In so ruling, the Virginia Supreme Court acted pursuant to VA. CODE 19.2-266 (Supp. 1979), which permitted the trial court, in its discretion, to "exclude from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial should not be violated . . . ." An appeal of the Virginia Supreme Court's order of dismissal was filed August 14, 1979, with the United States Supreme Court to challenge the validity of the Virginia statute. Richmond Newspapers, Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 204, 62 L.Ed.2d 132 (1979). *But cf.* United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979)

in *Gannett* fail to provide lower courts with guidance, it also has invited and produced a similar fragmentation of state appellate courts.[280]

Nevertheless, the argument of the majority that the Sixth Amendment does not generally grant the public a right of access to criminal trials is convincing. Textually, the amendment gives the right to a public trial only to the accused. If, as the petitioners in *Gannett* argued, the Sixth Amendment public trial right were merely a restatement of the common-law rule for open trials, then the Sixth Amendment would grant the public a right of access in civil and in criminal cases as well.[281] Yet the Sixth Amendment does not speak in terms of civil cases at all. Viewing the amendment's public trial right as personal to the defendant is not cause to fear that a defendant can compel exclusion of the public. While the amendment grants defendant a right to a public trial, it does not guarantee him the right to compel a private trial.[282] As the Court succinctly stated, "The ability to waive a constitutional right does not ordinarily carry with it the opposite of that right."[283] Interestingly, the majority and the dissent agreed that there is a strong public interest in open trials. Closure, it would seem, should

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(*Gannett* does not support exclusion of public from post-trial hearing); United States v. Powers, 477 F.Supp. 497, 498-99 (S.D. Iowa 1979) (closure of criminal trial not proper absent (1) consent of prosecutor or compelling reason for not requiring prosecution's consent, (2) clear and convincing evidence that closure would prevent the harm alleged and proven to exist, and (3) clear and convincing evidence that no effective alternatives to closure exist); Shiras v. Britt, ___ Ark. ___, 589 S.W.2d 18 (1979) (*Gannett* decision permitting closure of pretrial hearings inapplicable in Arkansas due to statute declaring that the proceedings of every court shall be open).

280. Most recently the four-member South Dakota Supreme Court interpreting *Gannett* produced three separate opinions. But a majority of that court did conclude that nothing in either the federal or state constitutions gave the press an absolute right of access to any part of a criminal trial, including the jury voir dire involved in the case at bar. Rapid City Journal v. Circuit Court, ___ S.D. ___, 283 N.W.2d 563 (1979). *But see,* Commercial Printing Co. & Tosca v. Lee, 262 Ark. 87, 553 S.W.2d 270 (1977) (press could not be excluded from voir dire in criminal case where state statute provided that the sittings of every court shall be public).

281. Gannett v. DePasquale, ___ U.S.___, 99 S.Ct. 2898, 2908-09, and nn. 15 and 16 (1979).

> In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

Id. But cf. Quick, *A Public Criminal Trial,* 60 DICKINSON L. REV. 21, 22 (1955) [hereinafter cited as Quick] (suggesting that the common law practice of open trials motivated the public trial guarantee of the Sixth Amendment).

282. Gannett, 99 S.Ct. at 2907.

283. Singer v. United States, 380 U.S. 24, 34 (1965). *Cf. also* Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 559, 149 P.2d 563, 565 (1971) (defendant has no right to a secret trial).

only be invoked where there is no alternate remedy to preserve the defendant's right to a fair trial.[284]

The public trial guarantee was one of the first procedural rights to be extended to the states through the Fourteenth Amendment as a fundamental guarantee of due process.[285] Although no decision of the United States Supreme Court squarely holds that the Sixth Amendment right to a public trial is applicable to the states, it is now almost universally assumed to be binding on the states through the Fourteenth Amendment.[286] The same right is guaranteed in Article II, Section 24 of the Montana Constitution of 1972. The right to a public trial, one of the oldest and most closely guarded criminal guarantees,[287] entitles the accused to the presence of at least friends, relatives, and counsel at trial.[288] The accused is also entitled to adequate facilities for a "reasonable number" of persons who may wish to attend.[289] The defendant's right to a public trial extends to the entire proceeding and may be violated if the public is excluded from even part of it.[290]

Exclusion of the public from a criminal trial must be scrutinized in light of the dual purposes of the public trial right. These purposes are: (1) to prevent the use of the courts as instruments of persecution and to restrain abuse of judicial power by allowing the public the opportunity "to observe courts in the performance of their duties and to determine whether they are performing ade-

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284. *See* United States v. Powers, 477 F.Supp. 497, 498-99 (S.D. Iowa 1979).

285. *In re* Oliver, 333 U.S. 257 (1948).

286. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968), *reh. denied*, 392 U.S. 947 (1968) (due process clause of Fourteenth Amendment "now protects . . . the Sixth Amendment right . . . to a . . . public trial," *citing In re* Oliver, 333 U.S. 257 (1948)); Washington v. Texas, 388 U.S. 14, 18 (1967) *(citing* Oliver); Bennett v. Rundle, 419 F.2d 599, 603-04 (3d Cir. 1969); Commonwealth v. Marshall, 356 Mass. 432, 435, 253 N.E.2d 333, 335 (1969); State v. Schmidt, 273 Minn. 78, 80, 139 N.W.2d 800, 803 (1966) ("The right to a public trial can scarcely be regarded as less fundamental and essential to a fair trial than the right to assistance of counsel, also granted by the Sixth Amendment. Despite the absence of a specific holding, recent decisions of the United States Supreme Court tend to erase any lingering doubts that the right to a public trial, no less than the right to counsel, is entitled to protection from state invasion by the due process clause of the Fourteenth Amendment."); Riley v. State, 83 Nev. 282, 285, 429 P.2d 59, 61 (1967). Provisions similar to the Sixth Amendment's are found in most state constitutions. *In re* Oliver, 333 U.S. 257, 267-68 (1948). The right, apart from the Sixth Amendment, has been upheld even where the state constitution contains no express public trial guarantee. State v. Holm, 67 Wyo. 360, 382-90, 224 P.2d 500, 508-11 (1950). It has been regarded as fundamental even where it is only provided for by statute. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 773 (1954).

287. *In re* Oliver, 333 U.S. 257, 266-71 (1948).

288. *Id.* at 272.

289. Estes v. Texas, 381 U.S. 532, 584 (1965).

290. United States v. Sorrentino, 175 F.2d 721, 722 (3d Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

quately"[291] and (2) to instill in the spectators confidence in judicial remedies.[292] Thus, the first of these purposes reflects the defendant's interests; the second reflects the public's. By laying greater emphasis on one purpose than on the other, courts under similar fact situations could conceivably reach different conclusions regarding exclusion of the public. The majority in *Gannett* held, however, that only the first of the traditional dual purposes was implicated in the Sixth Amendment's guarantee of a public trial.[293] While acknowledging a strong societal interest in open trials, the Court held that the public's interest in the swift and fair administration of justice was not constitutionally grounded in the Sixth Amendment.[294] Hence, regardless of the balance that state courts would otherwise strike based on state law between the interest of the accused and that of the public, the federal balance may well be weighted in favor of the defendant.

Exclusion of all or part of the public over defendant's objection has been strictly limited to special exceptions: witness protec-

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291. Gannett, ___ U.S. ___, 99 S.Ct. at 2905-06 (1979); Estes v. Texas, 381 U.S. 532, 583 (1965); *In re* Oliver, 333 U.S. 257, 270 and 270 n.25 (1948); State v. Keeler, 52 Mont. 205, 218, 156 P. 1080, 1084 (1916). In construing the public trial guarantee of the 1889 Montana Constitution the Montana Supreme Court stated that:

> the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most important influence to accomplish this desired end.

Id.

292. *In re* Oliver, 333 U.S. 257, 270 n.24 (1948), *citing* State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916). In *Keeler* the Montana Supreme Court construed in what is arguably dicta the public trial guarantee of the state constitution to implicate "questions of public interests and concern." *Id.* at 218, 156 P. at 1083. The court stated, "The people are interested in knowing and have the right to know how their servants—the judge, county attorney, sheriff, and clerk—conduct the public's business." *Id. See also* Shiras v. Britt, ___ Ark. ___, 589 S.W.2d 18, 19 (1979). In holding that the *Gannett* decision permitting exclusion of press and public did not apply to Arkansas, the court stated:

> Courts operate for the benefit of the public . . . . When the public loses confidence in the ability of the courts to fully and impartially deal with those accused of crime, the public has a tendency to take the law into its own hands.

Id.

293. Gannett, ___ U.S. ___, 99 S.Ct. 2905-06.

294. *Id.* at 2907. The majority contended that the public's interest in the administration of justice was protected by the participants in the litigation, i.e., by the judge, the prosecutor, the accused and his counsel, and the jury. *Id.* The Montana Supreme Court has construed the public trial guarantee of the 1889 state constitution as requiring the presence of more than the participants:

> It must be understood that the framers of our fundamental law understood that, in order for a trial to be public, the attendance cannot be limited to those persons whose presence would be necessary in order to conduct the trial.

State v. Keeler, 52 Mont. 205, 217, 156 P. 1080, 1083 (1916).

tion is one.[295] Presentation of particularly morbid subject matter is another.[296] Presentation of subject matter which is prurient in nature has in some instances led to exclusion of the public when a statute authorizing such an exclusion has existed, but the statutory language has invariably been strictly construed and narrowly applied.[297] As regards subject matter of "prurient" interest, the Montana Supreme Court followed such a strict construction in *State v. Keeler*,[298] a 1916 statutory rape case, holding that the public cannot be excluded from criminal trials[299] over the accused's objection. The court referred to the predecessor of MCA § 3-1-313 (1979) which allowed the court to exclude the public in certain enumerated civil actions and to the public trial guarantee granted in Article III, Section 16 of Montana's 1889 constitution[300] and held that

> The Constitution has declared for public trials in criminal cases, and the legislature has said, in effect, that except in civil actions enumerated, the doors of the courtroom shall be open during all sittings of the court, and the power does not exist anywhere to exclude from the courtroom any one *sui juris* who comes into the presence of the Court when there are accommodations for him . . . .[301]

The court stated that the guarantees of Article III, Section 16 of the 1889 Constitution "were not intended as mere glittering generalities . . . . It was never intended that these guarantees be ignored, set aside or evaded."[302]

While the Montana court in *Keeler* vindicated the defendant's right to have his trial open to the public where the trial court had closed the trial on account of the salacious nature of the case, the Montana Supreme Court in what is arguably dicta also construed the state constitutional guarantee to a public trial as belonging to

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295. *See, e.g.*, State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). *See also* State v. Schmidt, 273 Minn. 78, 81, 139 N.W.2d 800, 803 (1966):

> [T]he term "public" is relative and not defined . . . . Hence, courts uniformly refuse to view the right to a public trial as absolute in the sense that everyone who wishes to attend may do so. Rather, . . . it is generally viewed as a limited privilege accorded to an accused, subject to the inherent power of the court to restrict attendance as the conditions and circumstances reasonably require for the preservation of order and decorum in the courtroom and to protect the rights of parties and witnesses.

296. *See, e.g.*, Citizen Publishing Co. v. Buchanan, 22 Ariz. App. 521, 528 P.2d 1280 (1974).

297. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

298. 52 Mont. 205, 156 P. 1080 (1916).

299. *Id.* at 215-18, 156 P. at 1082-84.

300. This section is identical to art. III, section 16 of the 1972 Montana Constitution.

301. 52 Mont. at 217-18, 156 P. at 1083.

302. *Id.* at 215, 156 P. at 1083.

the public generally as well as to the defendant personally:

> In our judgment, the purpose of this constitutional provision is threefold. Primarily it is for the benefit of the accused—to afford him the means of proving a fact with reference to some question of procedure which it may become necessary for him to prove in order to protect his rights, and to see that he is not unjustly condemned . . . . But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff and clerk—conduct the public's business.[303]

The court reached that result in part by construing the numerical predecessors of MCA §§ 3-1-312, -313 (1979),[304] which declare that all court proceedings are to be public except in certain enumerated civil cases, as a legislative implementation of the state public trial guarantee.[305] Declaring these statutes to be subject to the rule *expressio unius exclusio alterius,* the court concluded that the public has a general right of access to criminal trials.[306] They indicated, nevertheless, that courts have the power to exclude disorderly or dangerous persons in order to protect the due administration of justice[307] and, under some circumstances, to exclude minors.[308]

If Montana adheres to the rationale of *Keeler,* the public may well be accorded on state grounds the affirmative right of access to criminal trials which has been denied under the Sixth Amendment by the majority opinion in *Gannett.* Nevertheless, the public's right of access may not be as absolute as a superficial reading of *Keeler* may suggest. The *Keeler* court did say that the public trial right had to be considered in the context of other constitutional

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303. *Id.* at 218, 156 P. at 1083.

304. MCA § 3-1-312 (1979) provides: "The sittings of every court of justice must be public, except as provided in 3-1-313." MCA § 3-1-313 (1979) provides:

> (1) In an action for the dissolution of marriage, criminal conversation, or seduction, the court may direct the trial of any issue of fact joined therein to be private and exclude all persons except the officers, the parties, their witnesses, and counsel.
>
> (2) During the examination of a witness in any cause, the court may, in its discretion, exclude some or all of the other witnesses in the cause.

305. 52 Mont. at 217-18, 156 P. at 1083.

306. *Id.* There is authority elsewhere construing statutory language similar to that of the Montana statute to be merely repetitive of the accused's personal guarantee to a public trial. United Press Assoc. v. Valente, 308 N.Y. 71, 123 N.E.2d 777, 778-79 (1954). *But cf.* Quick, *supra* note 90, at 29-35 (arguing for public right of access to criminal proceedings); Shiras v. Britt, ___ Ark. ___, 589 S.W.2d 18 (1979) (statute providing for all court proceedings to be open construed to prevent exclusion from pretrial hearings).

307. *Id.* at 216-17, 156 P. at 1083.

308. *Id.* at 217, 156 P. at 1083.

provisions;[309] it also deemed the state constitution's public trial right as existing primarily for the defendant[310] and secondarily for the public.[311] Should the public's statutory right of access to criminal proceedings ever directly conflict with the defendant's right to a fair trial, the public's right may have to yield. In *Kirstowsky v. Superior Court* a California appellate court, while quoting approvingly from *State v. Keeler,* held that the California parent statutes to MCA §§ 3-1-312, -313 (1979) guaranteeing a public right of access to the "sittings of every court of justice" must be subordinated to "the higher right and duty of the court under the Constitution to see to it that the defendant receives a fair trial and has a fair opportunity to present his or her defense."[312]

Whatever balance is struck on state grounds generally between the public's right of access to criminal proceedings and the defendant's fair trial right, Montana law clearly gives the defendant the right to exclude the public from preliminary examinations. MCA § 46-10-201 (1979) provides:

> The justice may, in his discretion, *and must upon the request of the defendant exclude* from the preliminary examination every person not officially associated with the case before the Court. (emphasis added).

The statute embodies a significant exception to the general practice of public preliminary hearings in this country. Deriving from the Field Code of Criminal Procedure, this provision allowing closed preliminary hearings appears "in the statutory law of a numerically small block of states."[313] Of the sixteen to eighteen states

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309. *Id.* at 216, 156 P. at 1083.

310. *Id.* at 218, 156 P. at 1083.

311. *Id.*

312. Kirstowsky v. Superior Ct., 143 Cal. App.2d 744, 300 P.2d 163, 169 (1956). *Cf.* Shiras v. Britt, ___ Ark. ___, 589 S.W.2d 18 (1979). Although the United States Supreme Court held in *Gannett* that the press and public may be excluded from pretrial hearings, the Arkansas Supreme Court held the same rule did not apply in that state due to the existence of a statute declaring court proceedings to be open to the public:

> [A]s we view the issues before us, they are controlled by Ark. Stat. Ann. § 22-109 (Repl. 1962) which provides: "The sittings of every court shall be public and every person may freely attend the same." . . . Courts operate for the benefit of the public and like Caesar's wife should appear to be above reproach. When the public loses confidence in the ability of the courts to fully and impartially deal with those accused of crime, the public has a tendency to take the law into its own hands . . . . Needless to say, we have concluded that the rights of the accused to a fair and impartial trial do not exceed the rights of the public to observe justice in progress.

Id. at ___, 589 S.W.2d at 18-19.

313. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L. REV. 397, 407 (1961) [hereinafter cited as Geis].

which initially adopted parts or all of the Field Code, eight retained intact this statute permitting closed hearings.[314] Although the issue has not frequently been litigated, reviewing courts have upheld the defendant's right under the statute to exclude the public and the press from his preliminary examination.[315] In *People v. Elliot*,[316] for example, the California Supreme Court construed the statute as a legislative implementation of the accused's constitutional right to a fair trial by an impartial jury.[317] At preliminary hearings the evidence is presented mainly by the prosecution in an effort to convince the court that charges should be brought against the defendant. Press coverage of that evidence could prejudice members of the community from which the jury is drawn against the accused.

Public exclusion is also consonant with a respect for the accused's right to remain silent in the face of his accuser. Press reports of the accused's silence at preliminary hearing could conceivably prejudice prospective jurors against his cause. Despite a provision in the California Constitution similar to that in MCA § 46-20-701 (1979) that no cause should be reversed for error unless prejudice was shown to have resulted from the error, the California Supreme Court in *Elliot* held that failure to grant a defendant's motion to exclude the public from his preliminary examination was the denial of a substantive right and was per se reversible error, even without a showing of actual prejudice.[318] Because the statutory guarantee would otherwise be meaningless, prejudice would be presumed.[319]

Although the rules of criminal procedure provide for exclusion

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314. *Id.* at 409. Those eight states are Arizona, California, Idaho, Montana, New York, Nevada, North Dakota, and Utah. Justice Stewart's majority opinion in *Gannett* referred to the statutory practice of these eight states allowing exclusion of the public from preliminary hearings as support for his argument that "[c]losed pretrial proceedings have been a famliar part of the judicial landscape in this country" for a considerable time. ___ U.S. at ___, 99 S.Ct. at 2911.

315. People v. Elliot, 54 Cal.2d 498, 324 P.2d 225, 6 Cal. Rptr. 753 (1960); Azbill v. Fisher, 84 Nev. 414, 442 P.2d 916 (1968); *see also* State v. Meek, 9 Ariz. App. 149, 450 P.2d 115 (1968) (upholding as constitutional rule providing for mandatory exclusion from preliminary hearings at defendant's request); *see generally* Annot., 49 A.L.R.3d 1007 (1973); Ranney, *supra* note 12, at 829 n.48. In Estes v. Texas, 381 U.S. 532, 536 (1965), the Court noted:

> It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.

316. 54 Cal.2d 498, 324 P.2d 225, 6 Cal. Rptr. 753 (1960).

317. People v. Elliot, 54 Cal.2d 498, 324 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960).

318. *Id.* at 498, 324 P.2d at 229, 6 Cal. Rptr. at 758.

319. *Id.*

of the public from preliminary hearings, there are no provisions specifically granting the accused similar rights in suppression or other pretrial hearings. The *ABA Standards for Criminal Justice* advocate the adoption of a rule that would permit exclusion of the public from pretrial hearings generally, including suppression hearings, whenever the dissemination of evidence or argument adduced at the hearing might disclose matters that would be inadmissible at the trial and would probably interfere with the defendant's right to a fair trial by an impartial jury.[320] Where exclusion is ordered the *ABA Standards* provide that a complete record of the proceedings is to be kept and shall be made available to the public after disposition of the case.[321] In view of the rationale of *Kirstowsky* that the public's statutory right of access to criminal proceedings *must* be subordinated to the defendant's right to a fair trial, the guidelines of the *ABA Standards* could be judicially applied to exclude the public and the press from suppression hearings in appropriate cases. Under *Kirstowsky*, however, the exclusion may not be more expansive than is absolutely necessary to protect the defendant's fair trial right.[322]

A very recent Montana case may indicate, however, that the public right of access to criminal proceedings is broader in Montana than in California. In *Great Falls Tribune v. District Court*[323] a three to two majority of the Montana Supreme Court emphati-

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320. ABA STANDARDS, *supra* note 250, at § 3.1.

321. *Id.*

322. Kirstowsky v. Superior Court, 143 Cal. App.2d 744, 300 P.2d 163, 169 (1956). Arguably, the public right of access to criminal proceedings is broader in Montana than in California due to the "right to know" provision of the state constitution which guarantees the public a right "to observe the deliberations of all public bodies or agencies of state government." MONT. CONST. art. II, § 9. It is, however, questionable whether the provision can be construed as applying to criminal proceedings. The language of the section suggests that it was intended to provide public access to lawmaking and rulemaking bodies such as legislative committees and agencies. The provision expressly excepts "cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Even if the "right to know" provision were interpreted to apply generally to criminal proceedings, it is arguable that closure would be permissible under the privacy exception. Article II, section 10 of Montana's constitution provides that individual privacy should not be infringed absent a compelling state interest. On the basis of the right of privacy clause the Montana Supreme Court has held that the accused's protection against unreasonable searches and seizures under Montana's constitution is greater than that afforded by the corresponding guarantee in the Fourth Amendment of the federal constitution. *See, e.g.*, State v. Sawyer, ___ Mont. ___, 571 P.2d 1131, 1133 (1977). Similarly, it is possible that Montana could interpret the right of privacy clause as expanding the defendant's right to a fair trial under the state constitution. If, indeed, the accused is surrounded by a presumption of innocence until his guilt has been proven, the right of privacy could perforce mandate closure of some pretrial hearings to prevent prejudicing potential jurors. The public's interest would be safeguarded by releasing the pretrial transcript after the jury had been empanelled or after trial.

323. ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 502 (1980).

cally recognized an independent right of access to judicial proceedings.[324] The court set forth a full written opinion in support of its antecedent issuance of a writ of supervisory control vacating a trial court closure of voir dire proceedings to the public. The majority viewed the "right to know" provision of the state constitution which guarantees the public a right "to observe the deliberations of all public bodies or agencies of state government"[325] as creating a public right of access even though the Sixth Amendment to the Federal Constitution created none. Applying the plain meaning rule, the court declined to construe the state constitutional provision with the aid of the rules of statutory construction.[326] It found that "[t]he language of this provision speaks for itself"[327] and that it applied "to all public bodies of the state and its subdivisions without exception."[328] Nevertheless, the majority conceded that "this right of access or right to know is not absolute."[329] It must be balanced against the defendant's right to a speedy public trial.[330] Under the factual circumstances presented in the instant case, the court found the public's right prevailed over the defendant's. The majority appears to have been influenced in its decision primarily by three factors. First, it considered the news accounts dealing with the brutal homicide and rape allegedly committed by the defendant to be neither so inflammatory nor pervasive as to threaten defendant's fair trial right.[331] Secondly, the court maintained that

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324. *Id.* at ____, ____ P.2d at ____, 37 St. Rptr. at 505.

325. MONT. CONST. art. II, § 9. That provision provides in full:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

See Great Falls Tribune v. District Ct., ____ Mont. ____, ____ P.2d ____, 37 St. Rptr. 502, 505 (1980) (court recognition of privacy exception to right-to-know provision).

326. *Id.* at ____, ____ P.2d at ____, 37 St. Rptr. at 505.

327. *Id.*

328. *Id.* The majority declared closure to be "simply censorship at the source—a denial of the right to know." *Id.* at ____, ____ P.2d at ____, 37 St. Rptr. at 506. The court viewed closure as frequently being counterproductive because "it focuses public attention on the accused and the crime by generating publicity which neither would otherwise merit." *Id.*

329. *Id.* at ____, ____ P.2d at ____, 37 St. Rptr. at 506.

330. *Id.*

331. *Id.* In dissent, Justice Sheehy asserted that whether or not the press misrepresented the purported facts of the crime was irrelevant to determining whether voir dire should be closed: "What must be examined is whether or not the facts of the crime as printed or broadcast, true or false, make it likely that an impartial jury cannot be empaneled in the area from which a jury will be drawn." It is difficult to comprehend, however, how closure of voir dire to the press and public remedies prior adverse publicity. At a later point in his dissent, Justice Sheehy suggested that access by the public and press to voir dire could affect the "candor and willingness" of the prospective jurors to respond openly to questions if their names, addresses, and answers were exposed to the public. *Id.* at ____,

the Montana Constitution imposed a stricter standard in order to authorize closure than does the Federal Constitution due to the fact that the Federal Constitution has no counterpart to the Montana "right to know" provision.[332] Thirdly, the majority found the United States Supreme Court's holding in *Gannett* to be inapplicable.[333] *Gannett* allowed the closure of a pretrial suppression hearing; the present case involved "closure of the entire voir dire examination of all prospective jurors."[334] The Montana court acknowledged that "suppression hearings involve a special risk [of] disclosure of tainted evidence."[335] But, in the court's view, the rationale of *Gannett* could not be extended to justify closure of the trial itself, of which voir dire is a part: "Closing any part of trial is simply the first step down that primrose path that leads to destruction of those societal values that open public trials promote. Nothing short of strict and irreparable necessity to ensure defendant's right to a fair trial should suffice."[336]

In dissent, Justice Sheehy cautioned against fashioning on state grounds an absolute right of access to all criminal proceeding.[337] For Montana's "right to know" clause may not vitiate the substantive guarantees of the Sixth Amendment of the federal constitution.[338] If the public right of access under state law and the defendant's right to a fair trial ever conflict, the supremacy clause mandates that federal law prevail.[339] Insistence upon public access to all criminal pretrial hearings regardless of the prejudicial effect on the accused would ultimately result in some reversals by appellate courts for denial of accused's federal fair trial right.

V. Search and Seizure

A. *Standing*

In a recent case the United States Supreme Court purportedly fashioned a new test to determine whether a defendant is the proper party to challenge the legality of a police search or seizure and to invoke the exclusionary remedy. For reasons to be discussed there is no reason for Montana courts to adopt the Supreme

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___ P.2d at ___, 37 St. Rptr. at 518.

332. *Id.* at ___, ___ P.2d at ___, 37 St. Rptr. at 506.

333. *Id.* at ___, ___ P.2d at ___, 37 St. Rptr. at 507.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at ___, ___ P.2d at ___, 37 St. Rptr. at 519 (Sheehy, J., dissenting).

338. *Id.*

339. *Id.*

Court's rationale. The ability to challenge the constitutionality of police practices is commonly denoted as one of the standing of the moving party to raise the Fourth Amendment claim. In order to have standing the party seeking relief must have an adversary stake in the outcome.[340] A criminal defendant's personal stake in avoiding conviction does not suffice. The United States Supreme Court has refused to extend standing generally to everyone against whom illegally seized evidence is admitted, as a matter of constitutional interpretation and as a matter of policy. As is true of constitutional rights generally,[341] Fourth Amendment rights are considered personal rights and may only be asserted by those whose rights are violated.[342] The claimant must himself have been the "victim" of the search or seizure.[343] As a matter of policy the Court has refused to confer standing to raise vicarious Fourth Amendment claims in order to avoid a more widespread invocation of the exclusionary rule in criminal trials.[344] Expanded application of the exclusionary rule would result in relevant and reliable evidence being kept from the trier of fact more frequently.[345] The function of the jury as the seeker of truth would be severly impeded[346] in cases which reap no commensurate benefits by way of deterrence of illegal police activity.[347] Montana follows the same general rule as the

340. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court explained that requiring the party to demonstrate "a personal stake in the outcome of the controversy" is intended "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204; *see generally* 3 W. LAFAVE, SEARCH AND SEIZURE, § 11.3 at 543 (1978) [hereinafter cited as LAFAVE].

341. *See, e.g.,* Tileston v. Ullman, 318 U.S. 44, 46 (1943).

342. Alderman v. United States, 394 U.S. 165, 174 (1969).

343. Jones v. United States, 362 U.S. 257, 261 (1960).

344. Rakas v. Illinois, 439 U.S. 128, 137 (1978). The Court expressly recognized the propriety of considering policy in determining the scope of the standing rule. It stated that "misgivings as to the benefit of enlarging the class of persons who may invoke [the exclusionary] rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations." *Id.* at 138.

345. 439 U.S. at 137.

346. *Id.*

347. *See* United States v. Calandra, 414 U.S. 338, 348 (1974). There the Court stated that its standing rule "is premised on a recognition that the need for deterrence and hence the rationale for excluding evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Id.* Since its inception the exclusionary rule has served two basic functions. The first is the deterrence of lawless police conduct. Terry v. Ohio, 392 U.S. 1, 12 (1967). The second is the preservation of "judicial integrity" by preventing "unhindered government use of the fruits" of invasions of the constitutional rights of the citizens. *Id.* at 12-13. Nevertheless the Court has held that "the proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of [its] limitations." *Id.* at 14. Regardless of how effective it is where the objective of the police is obtaining convictions, "it is powerless to deter invasions of consti-

United States Supreme Court that for standing purposes the Fourth Amendment guarantee against unreasonable search and seizures is a personal right only.[348]

The Court has not been altogether consistent in defining just who is a victim of a search or seizure so as to have standing. At times the Court has linked standing to property concepts, indicating that standing is acquired by having a proprietary or possessory interest in the premises[349] searched or a property interest in the items seized.[350] At other times the Court has been critical of such an approach. In *Jones v. United States*,[351] for example, the Court rejected "any reliance upon the subtle distinctions of the common law regarding private property, concluding instead that 'anyone legitimately on the premises where a search occurs' has standing."[352]

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tutionally guaranteed rights where the police either have no interest in prosecuting while willing to forego successful prosecution in pursuit of some other goal," for example unreasonable harassment of unpopular minorities. *Id.* Thus, the Court has concluded that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.* at 15. The exclusionary rule is, however, arguably an effective remedy in situations where police "conduct unconstitutional searches against small fish in order to catch big ones." Amsterdam, *Perspectives, supra* note 62, at 433. Precisely due to the danger that police may be willing to make such trade-offs, Justice Fortas in his dissent in Alderman v. United States, 394 U.S. 165 (1969) advocated granting standing to a defendant whenever government agents conducted their unlawful search and seizure to obtain evidence to use against him. *Id.* at 208-09. Nevertheless, Fortas's position that anyone who is the "target" of an illegal search or seizure possesses standing should be considered with the deterrent purpose of the exclusionary rule in mind. There would only be sufficient reason to adopt a target-standing rule if it could be shown to further the deterrence objective of the Fourth Amendment exclusionary rule. 3 LAFAVE, *supra* note 340, at 600. The Court in Rakas v. Illinois, 439 U.S. 128 (1978), however, squarely rejected the defendant's target-standing theory on grounds that such an expanded standing rule would result in expanded use of the exclusionary rule during criminal trials. *Id.* at 137.

348. State v. Tritz, 164 Mont. 344, 351, 522 P.2d 603, 607 (1974), *cert. denied*, 420 U.S. 909 (1974); *see also* State v. Azure, ___ Mont. ___, 591 P.2d 1125, 1131-32 (1979) (one neither injured nor jeopardized by the operation of a statute has no standing to challenge its constitutionality); State v. Kirkland, ___ Mont. ___, 602 P.2d 586, 590-91 (1979).

349. Brown v. United States, 411 U.S. 223 (1973); *see also* LAFAVE, *supra* note 1, § 11.3 at 544.

350. United States v. Jeffers, 342 U.S. 48, 53-54 (1951). *See generally* Annot., 78 A.L.R.2d 246, 248-49 (1961) (generally defendant must show interest in premises searched or property seized to have standing).

351. 362 U.S. 257 (1962).

352. *Id.* at 266; *see also* Katz v. United States, 389 U.S. 347 (1968). In *Jones*, the Court set forth two alternate bases for standing. First, it held that anyone legitimately on the premises where a search occurs could challenge its legality by means of a motion to suppress. 362 U.S. at 266-67. Thus a person aggrieved by a purportedly illegal search could acquire standing by demonstrating an "interest in connection with the searched premises that gave rise 'to a reasonable expectation of freedom from government intrusion' upon those premises." Combs v. United States, 408 U.S. 224, 227 (1972) (per curiam) (quoting from Mancusi v. DeForte, 392 U.S. 364, 368 (1968)). One such qualifying interest was ownership of the property. According to the *Jones* rationale, another was the claimant's legitimate

Jones held that a person who had been permitted to use a friend's apartment for the night had standing to object to its search by federal narcotics agents.[353] In *Mancusi v. DeForte*[354] the Court finally arrived at a general standard against which all of its prior standing pronouncements would be measured. The Court there held "that capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[355]

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presence in the searched premises.

Secondly, *Jones* established a rule of "automatic standing" to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged. 362 U.S. at 263-64. Prior to *Jones* a defendant charged with a possessory offense (e.g., drug possession) was faced with a dilemma if he wished to challenge evidence obtained by an illegal search. He could assert a proprietary interest in the incriminating evidence in order to have standing to contest the illegal search or seizure. He would then be faced with the possibility that the allegations made on the motion to suppress could be issued against him at trial. The "possession" requirement also encouraged defendants to perjure themselves to attain "standing." On the other hand, the defendant could choose to forgo any Fourth Amendment challenge to the evidence and contend at trial that he had not owned or possessed the evidence. In that event the objectionable evidence would certainly reach the jury. The prosecution was given the "advantage of contradictory positions as a basis for conviction." In Jones, 362 U.S. at 263, defendant's conviction flowed from his possession of the contraband at the time of search. Yet the fruits of the search were admitted into evidence on the grounds defendant did not have possession of the drugs at that time. *Id.* The "automatic standing" rule of *Jones* eliminated the requirement of alleging possession. In Simmons v. United States, 390 U.S. 377 (1968), the Court subsequently held that the testimony of a defendant adduced at a pretrial hearing in support of a motion to suppress could not thereafter be admitted against him at trial if the defendant objects. Whether the holding in *Simmons* has eliminated the need for *Jones's* automatic standing has not been decided by the Court. *See* Brown v. United States, 411 U.S. 223, 228-29 (1973); Rakas v. Illinois, 439 U.S. 128, 135 n.4 (1978).

353. 362 U.S. at 267.

354. 392 U.S. 364 (1967). In *Mancusi* the Court held that a person could have a reasonable expectation of privacy in a shared office space even though there was no expectation of absolute privacy.

355. *Id.* at 368. The Court in *Mancusi* thus adopted essentially the same reasonable-expectation-of-privacy test for determining standing that it had adopted in Katz v. United States, 389 U.S. 347 (1967), for determining whether a search has occurred. As Professor LaFave has noted, the various standing tests of the Court are not necessarily in conflict: "The fundamental inquiry regarding standing is that articulated in Mancusi: whether the conduct which the defendant wants to put in issue involved an intrusion into *his* reasonable expectation of privacy." 3 LAFAVE, *supra* note 340, § 11.3 at 544.

In the *Katz* decision the United States Supreme Court held that electronic monitoring of a telephone booth without an actual physical intrusion or "trespass" into the booth was a "search" for the purposes of the Fourth Amendment because it "violated the privacy upon which [the user of the booth] . . . justifiably relied." 389 U.S. at 353. Starting with the premise that "the Fourth Amendment protects people, not places," *id.* at 351, the Court concluded that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *id.*, whereas "what he seeks to preserve as private, even in a area accessible to the public, may be constitutionally protected." *Id.* at 351-52. Subsequent Supreme Court cases have generally followed the *Katz*

In a controversial five to four decision, the Court last term rejected the "legitimately on the premises" standing formulation of *Jones*.[356] In *Rakas v. Illinois*[357] an officer had received a radio report of a robbery and stopped what he believed to be the getaway car. After ordering the occupants out of the car, he searched its interior, finding a sawed-off rifle under the front seat and rifle shells in the glove compartment. The defendants conceded that they did not own the vehicle but were merely passengers. Neither did they assert ownership of the rifle or the shells. The defendants argued "that their occupancy of the automobile . . . was comparable to that of Jones in the apartment."[358] The Court disagreed.

Justice Rehnquist, writing for the majority, abandoned the "legitimately on the premises" standard of *Jones* in favor of an inquiry into whether the defendant had a "legitimate expectation of privacy" in the places searched. In taking this action, Justice Rehnquist purported to be eliminating the traditional standing inquiry and to be subsuming it under the substantive Fourth Amendment protection.[359] In the majority's view, a literal applica-

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privacy test in determining the scope of Fourth Amendment protection. *See* Amsterdam, *Perspectives, supra* note 62, at 358. The *Katz* test is often described as an inquiry into whether the individual whose interests are affected by a government intrusion had a "reasonable expectation of privacy." "Expectation" is not a term used by Justice Stewart in his majority opinion. Subsequent cases, beginning with Terry v. Ohio, 343 U.S. 1, 9 (1968), borrowed the formulation from Justice Harlan's concurring opinion. He used it to denote a two-pronged inquiry into whether the defendant had (1) "an actual (subjective) expectation of privacy" which (2) "society is prepared to recognize as 'reasonable.'" *Id.* at 361.

356. Rakas v. Illinois, 439 U.S. 128 (1978).

357. 439 U.S. 128 (1979).

358. *Id.* at 141.

359. *Id.* at 138-40. He asserted that it served no analytical purpose to consider the principle that Fourth Amendment rights are personal rights as a matter of standing. *Id.* at 138. Instead he concluded, "[T]he better analysis focused forthrightly on the extent of a particular defendant's rights under the Fourth Amendment rather than on any theoretically separate but invariably intertwined concept of standing." *Id.* at 139. *See also* Note, 93 HARV. L. REV. 1, 172 (1979). The Court's purported elimination of the standing question in the context of the Fourth Amendment is unlikely to have much practical effect. The Court's action was undoubtedly motivated by the fact that the inquiry into both the standing and the substantive Fourth Amendment rights of the claimant are governed by the same *Katz-Mancusi* privacy standard. Nevertheless the Court still will have to determine whether the complaining party had a Fourth Amendment interest impinged by the search (traditional standing) before inquiring whether the search was "reasonable" (the substantive inquiry). *See* Note, 93 HARV. L. REV. 1, 176 (1979). Indeed, the Court in *Rakas* engaged solely in the former of those two inquiries which amounted to nothing more than an examination of whether the defendants had traditional standing to raise a Fourth Amendment claim. Furthermore, the Court is technically incorrect when it equates standing with the substantive inquiry. The standing inquiry has always focused on whether the police intruded on the particular defendant's justified expectation of privacy. The substantive Fourth Amendment question whether the police intruded on anyone's justified expectation of privacy, i.e. whether a search or seizure has occurred, is a separate inquiry. *See* 3 LAFAVE, *supra* note

tion of the *Jones* standard created "too broad a gauge for the measurement of Fourth Amendment rights."[360] It did not in all instances accurately indicate whether the claimant had an expectation of privacy in the place searched legitimately deserving of substantive Fourth Amendment protection.[361] Applying the substantive "legitimate expectation of privacy" standard, the Court held that the defendants did not have the requisite privacy interest "in the glove compartment or area under the seat of the car in which they were merely passengers."[362] The only reason given for this holding was that defendants "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.[363]

In the name of developing the *Katz* privacy test, the Court in *Rakas* instead revived the pre-*Katz* "protected areas" thinking, emphasizing "the centrality of ownership and possession by explicitly investing only the owner/possessor with a clear legitimate expectation" of privacy.[364] While Justice Rehnquist said that an individual's legitimate presence would not be totally irrelevant for Fourth Amendment analysis, he did not consider that factor at all

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340, § 11.3 at 57 (Supp. 1980).

360. 439 U.S. at 142.

361. *Id.* at 140-48. That the *Jones* standard was no litmus-paper test indicating the presence of Fourth Amendment rights was shown by the widely divergent results in lower court decisions. *Id.* at 145.

362. 439 U.S. at 148.

363. *Id.* The Court's analysis is conclusory, assuming that nothing but a property interest in the car could give rise to a "legitimate" expectation of privacy. The Court stated that the area under the seats and the glove compartment, "[l]ike the trunk of an automobile . . . are areas in which a passenger *qua* passsenger would not normally have a legitimate expectation of privacy." *Id.* at 148-49. The majority opinion distinguished both *Katz* and *Jones* in which the defendants had been found to have the required expectation of privacy in a phone booth and an apartment, respectively. The claimants in those cases, in contrast to the passenger in *Rakas*, had complete dominion and control over the area searched and could exclude others from the area. It is unclear what substantial difference exists between the factual situations in *Katz* and *Jones*, on the one hand, and that in *Rakas* on the other. Katz merely entered a phone booth and shut the door. Jones acquired a key to a friend's apartment and spent the night there. Rakas entered a friend's car and shut the door. It would seem that Rakas and his cohorts had just as much power to exclude others.

In dissent, Justice White accused the majority of holding that the Fourth Amendment protects "property not people." 439 U.S. 156 (White, J., dissenting). Referring to a line of cases in which people in taxicabs, Rios v. United States, 364 U.S. 253 (1960), phone booths, Katz v. United States, 384 U.S. 347 (1967), and friends' apartments, Jones v. United States, 362 U.S. 257 (1960), had been permitted to challenge searches, the dissent concluded the majority could have only reached its results by reintroducing long-abandoned property concepts into Fourth Amendment analysis.

364. Note, 93 HARV. L. REV. 1, 178 (1979). The Court, invoking the *Katz* privacy standard, has gradually shifted the requisite "privacy reliance" from "justifiable" to "reasonable" to "legitimate," and in the process has moved conceptually farther from the perspective of the individual and closer to the perspective of the government. *Id.* at 179-80.

in evaluating the *Rakas* facts. Indeed, the Court in *Rakas* abandoned legitimate presence altogether as an analytical tool in deciding the case. As one commentator has pointed out, "[T]he only interests specifically given a clear stamp of legitimacy in *Rakas* are those based on property and related concepts of property control."[365] In the majority's view, "concepts of real or personal property law" were a major source of the legitimization of privacy interests.[366]

There is an underlying irony in the majority's reliance on the *Katz*-based privacy test. In *Katz,* the Supreme Court departed from the "constitutionally protected areas" standard applied in prior cases in order to determine whether the particular intrusions by the sovereign into individual interests were violative of the Fourth Amendment. *Katz* purported to do away with all simplistic property-related formulas with the observation that they cannot "serve as a talismanic solution to every Fourth Amendment problem."[367] The Court's holding in *Rakas* is a departure from a long line of cases which have refused to recognize proprietary interests as the only basis of constitutional analysis.[368] By viewing the concept of legitimate presence as independent of the *Katz* standard rather than as a component of it as suggested by Justice Powell's concurrence,[369] the majority missed the opportunity to provide a principled test for applying the general privacy standard of *Katz.*[370] The majority's apparent regard of property as the sole touchstone of privacy threatens a return to a talismanic, one-dimensional view of the Fourth Amendment just as much as does the dissent's advocacy of a literal application of the *Jones* "presence" standard.[371]

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365. *Id.* at 178.

366. 439 U.S. at 143-44 n.12. While stressing in his concurring opinion that "no single factor should invariably be determinative in applying the legitimate expectation of privacy test," *id.* at 152 (Powell, J., concurring), and while suggesting several criteria in addition to proprietary interests, *id.* at 152-53, Justice Powell nevertheless viewed property interests as an important criterion: "[P]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." *Id.* at 153.

367. 389 U.S. at 351 n.9.

368. *See, e.g.,* Combs v. United States, 408 U.S. 224, 227 (1972) (per curiam); Mancusi v. DeForte, 392 U.S. 364, 367-69 (1968); Katz v. United States, 389 U.S. 347, 351 (1967); Jones v. United States, 362 U.S. 257 (1960).

369. 439 U.S. at 152-53 (Powell, J., concurring); *see* note 366 *supra.*

370. The Court in *Katz* conspicuously avoided identifying the privacy interests protected by the amendment. *See* Amsterdam, *Perspectives, supra* note 62, at 365; Katz v. United States, 389 U.S. 347, 351-52 (1967).

371. Any literal application of the "legitimately on the premises" language which extends the coverage of the Fourth Amendment beyond the range of *Katz* would be invalid.

Notwithstanding the majority's observation "that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes,"[372] the Court's rejection of the "legitimately on the premises" formulation is not without implications for searches of dwellings. Justice Rehnquist asserted that petitioners' claim would fail "even in an analogous situation in a dwelling place"[373] because defendants had made no showing that they had a "legitimate expectation of privacy," in the places searched.[374] At an earlier point he wrote that the literal application of the "legitimately on the premises" standard would permit the most casual visitor to object to a search of the basement in which he had never been if he merely happened to be in the kitchen at the time of the search.[375] Similarly it would permit a challenge by a person who walked into the house one minute before a search commenced and left one minute after it ended.[376] This and other comments in *Rakas* might lead one to conclude that only a regular resident or a person with complete dominion and control over the house would have standing to challenge the legality of a search of the premises while he is present. As one writer has noted, such an unsound rule is not mandated by *Rakas*, "for the approach of the four dissenters and the two concurring justices points the other way."[377] As the concurring opinion[378] and dissent[379] recognized, the Fourth Amendment guards the security of the person as well as possessions. That aspect of the amendment was not placed in issue since petitioners did not challenge "the constitutionality of the police action in stopping the automobile in which they were riding; nor [did] they complain of being made to get out of the vehicle."[380] Defendants only attempted to challenge the subsequent search. Clearly the defendants would have had standing to challenge the intrusion upon their personal freedom resulting from the police's action in stopping their car and ejecting them from it.[381] Notwith-

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See Note, 93 HARV. L. REV. 1, 177 (1979); Mancusi v. DeForte, 392 U.S. 364, 367-70 (1968); *Id.* at 375-76 (Black, J., dissenting); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 345-46 (1970); Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 448 (1975).

372. 439 U.S. at 148.

373. *Id.*

374. *Id.*

375. *Id.* at 142.

376. *Id.*

377. 3 LAFAVE, *supra* note 340, § 11.3 at 59 (Supp. 1980).

378. 439 U.S. at 150-56 (Powell, J., concurring).

379. *Id.* at 156-69 (White, J., dissenting).

380. *Id.* at 150-51 (Powell, J., concurring).

381. *See* United States v. Williams, 589 F.2d 210 (5th Cir. 1979), *reh. ordered*, 600

standing *Rakas*, therefore, a passenger in a car or a momentary visitor to a house or apartment has standing to challenge alleged unconstitutional seizures of their persons. A passenger in a car may also have standing to object to a vehicle search if his personal property is in the car.[382] The Court emphasized that the holding was not to be read as implying "that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized in the search."[383]

In Montana the effect of *Rakas* may be somewhat limited. The Montana Supreme Court has construed the right to privacy provision[384] of the Montana constitution as affording an individual more protection against unreasonable search and seizure than is included in Fourth Amendment concepts of privacy.[385] Thus, as the decided cases in Montana suggest,[386] Montana law may well recognize a legitimate expectation of privacy in circumstances where federal law acknowledges none. It is quite likely that the Montana court would not limit legitimate privacy interests under state law to property-related concepts such as possession, dominion, or control. There is therefore no reason for Montana courts to look to *Rakas* for guidance in determining who has standing to object to purportedly illegal searches or seizures.

F.2d 18 (1979) (Noting that *Rakas* did not apply to this question, the Court assumed that passengers on a vessel had standing to object to the Coast Guard's stopping and boarding of the ship.).

382. 3 LAFAVE, *supra* note 340, § 11.3 at 66 (Supp. 1980); *but see* State v. List, 166 N.J. Super. 368, 399 A.2d 1040 (1979).

383. 439 U.S. at 142 n.11.

384. MONT. CONST. art. II, § 10.

385. *See* State v. Sawyer, ___ Mont. ___, 571 P.2d 1131, 1133 (1977) ("We need not consider the Fourth Amendment issue because we view the Montana Constitution to afford an individual greater protection in this instance than is found under the Fourth Amendment in Opperman."); State v. Brackman, ___ Mont. ___, 582 P.2d 1216, 1222 (1978) (The standard necessary to justify police invasion of "individual privacy" is a showing of a "compelling state interest," not one of "probable cause."); *see also* Katz v. United States, 389 U.S. 347, 350-51 (1967) (The protection of a person's general right to privacy is left to the law of the individual states.); Oregon v. Hass, 420 U.S. 714, 719 (1975) (A state may impose greater restrictions on police activity than the United States Supreme Court has deemed necessary on federal constitutional grounds.).

386. *See, e.g.*, State v. Sawyer, ___ Mont. ___, 571 P.2d 1131 (1977) (holding an inventory search of defendant's automobile violative of defendant's right to privacy; the United States Supreme Court had upheld such an inventory search in South Dakota v. Opperman, 428 U.S. 364 (1976)); State v. Brackman, ___ Mont. ___, 582 P.2d 1216 (1978) (holding "consensual participant monitoring" violative of defendant's state-guaranteed right to privacy where under identical facts the United States Supreme Court had upheld the use of miniaturized radio equipment concealed on a police informer whose conversations with the defendant were simultaneously transmitted to monitoring government agents. United States v. White, 402 U.S. 745 (1971)).

B. *Developments Relating to the Scope of the Privacy Standard*

Recent holdings of the United States Supreme Court portend to erode the substantive protection afforded by the Fourth Amendment by attenuating the scope of the privacy standard established by *United States v. Katz*.[387] In *Katz* the United States Supreme Court departed from the "constitutionally protected areas" or trespass standard applied in prior cases[388] in order to determine whether a given activity of the sovereign constituted a search.[389] In *Katz* the Court held that the electronic monitoring of a telephone booth without an actual physical intrusion or "trespass" into the booth constituted a search and seizure within the meaning of the Fourth Amendment[390] because it "violated the privacy upon which [the user of the booth] . . . justifiably relied."[391] Starting with the premise that "the Fourth Amendment protects people, not places,"[392] the Court concluded that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"[393] whereas "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[394]

Subsequent decisions of the Supreme Court have generally followed *Katz* in determining the scope of Fourth Amendment protection.[395] The *Katz* test is often described as an inquiry into whether the individual whose interests are affected by a government intrusion had a "reasonable expectation of privacy." "Expectation" is not a term used by Justice Stewart in his majority opin-

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387. 389 U.S. 347 (1967).

388. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942).

389. As used in the Fourth Amendment context the term "search" does not refer to a particular way in which the government invades constitutionally protected interests; it is rather "a description of the conclusion that such interests have been invaded." Amsterdam, *Perspectives, supra* note 62, at 385. The Montana Supreme Court, however, has defined a "search" more mechanistically as "an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in the prosecution of a criminal action; it implies an exploratory investigation or quest." State v. Williams, 153 Mont. 262, 269, 455 P.2d 634, 638 (1969). The most important element of the *Williams* test is that the police officer be acting with the intention to find evidence; otherwise there is no search within the definition of the Fourth Amendment. State v. Braden, 154 Mont. 90, 96-97, 460 P.2d 85, 88 (1969); State v. Emerson, 169 Mont. 284, 286-87, 546 P.2d 509, 510 (1976).

390. 389 U.S. at 353.

391. *Id.*

392. *Id.* at 351.

393. *Id.*

394. *Id.* at 351-52.

395. Amsterdam, *Perspectives, supra* note 62, at 358.

ion. Subsequent cases beginning with *Terry v. Ohio*[396] borrowed the formulation from Justice Harlan's concurring opinion. He explained the "reasonable expectation of privacy" test as a two-fold inquiry into whether (1) the claimant had exhibited a subjective expectation of privacy, (2) that society was prepared to recognize as reasonable.[397] Implicit in this two-pronged test is a certain tension or balancing of priorities between what the individual subjectively expects in the way of privacy on the one hand and what the court thinks that society is willing to grant him in this regard on the other.[398] In striking a balance between individual and societal

396. 343 U.S. 1, 9 (1968).

397. 389 U.S. at 361.

398. An actual, subjective expectation of privacy would obviously be a totally inadequate standard. As noted by Professor Anthony Amsterdam, if such a standard were in effect, the government "could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we are all forthwith being placed under comprehensive electronic surveillance." Amsterdam, *Perspectives, supra* note 62, at 358.

In applying the privacy standard the Court has indeed purported to consider what society will accept as "reasonable" without making a systematic, principled attempt to identify what individual privacy interests are protected. In balancing the individual's interests in being free from government intrusion against society's interest in making an intrusion, the Court has interjected policy considerations, most notably a concern for effective law enforcement, into the privacy test of *Katz*. In order to determine whether a warrant should have been required under the factual situation in United States v. White, 401 U.S. 745 (1971), for example, Justice Harlan in his dissenting opinion advocated that the nature of a particular police procedure and the likely extent of its impact on the individual's sense of security be balanced against the utility of the conduct as a technique of law enforcement. *Id.* at 786 (Harlan, J., dissenting). The case involved the use of miniaturized radio equipment concealed on a police informer whose conversations with the defendant were simultaneously transmitted to recording equipment and to monitoring agents. The majority analyzed the situation as substantially like a conversation between two persons, one of whom later decides to relate what the other had said to the police, and held that the defendant had "no justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." *Id.* at 749.

In State v. Brackman, ___ Mont. ___, 582 P.2d 1216 (1978), under facts identical to those in *United States v. White*, the Montana Supreme Court struck down police use of warrantless "consensual participant monitoring," i.e., the use of electronic surveillance equipment concealed on a police informer whose conversations with the defendant are simultaneously transmitted to concealed agents. The court held that electronic interception by third parties of conversations between individuals who neither consent to nor know of the interception was a violation of their right to privacy guaranteed by the Montana Constitution. Moreover, a "compelling state interest" was held to be required under Montana's constitutional right of privacy before participant electronic monitoring could be conducted. In State v. Hanley, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 427 (1980) (opinion after rehearing) the court approved of the procedure whereby officers obtained a search warrant prior to engaging in participant electronic monitoring. The court did not make clear what showing was required to obtain such a search warrant, whether of "probable cause" or "compelling state interest." *Brackman* would seem, however, to impose the latter requirement. The standard of "compelling state interest" is admittedly vague. Nevertheless there are indications that it may not impose a heavy burden on the state. In Zander v. District Court, ___ Mont. ___, 591 P.2d 656 (1979), the court held that there was no impermissible

interests the Court has gradually shifted the requisite degree of privacy reliance from "justifiable"[399] to "reasonable"[400] to "legitimate."[401] The result has been that the Court has moved farther from the perspective of the individual and closer to the perspective of the government.[402]

This shift in perspective is evidenced in the Court's most recent decisions on Fourth Amendment issues. In *Rakas v. Illinois*,[403] the Supreme Court held that passengers of an automobile who assert neither a proprietary nor a possessory interest in the automobile or in the property seized therefrom have no legitimate expectation of privacy sufficient to allow them to challenge a purportedly illegal search of the vehicle by police officers.[404] The Court thus returned to pre-*Katz* property-related concepts such as ownership, possession, dominion, and control in order to define what sort of subjective expectations of privacy society is prepared to acknowledge as legitimate.[405] While rejecting the concept of "constitutionally protected areas" as a "talismanic solution to every Fourth Amendment problem,"[406] *Katz* did not completely repudiate the concept. It therefore remained unclear to what extent the

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infringement of the right of privacy guaranteed under Article II, section 10 of Montana's constitution where an officer acting pursuant to a reasonable belief that a burglary was in progress entered the defendant's trailer without a warrant and inadvertantly discovered marijuana in the closet. The court found a "compelling state interest" sufficient to infringe upon the defendant's right of privacy in the state's interest in protecting the home and property of its citizens from unlawful intrusion. In light of this opinion, it is conceivable that the court would find the state's interest in enforcing its laws to be a "compelling state interest" which would permit issuance of a search warrant to allow participant electronic monitoring.

399. *See* Katz v. United States, 389 U.S. 347, 353 (1967); United States v. White, 401 U.S. 745, 748-49 (1971).

400. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Terry v. Ohio, 392 U.S. 1, 9 (1968); Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Combs v. United States, 408 U.S. 224, 227 (1972) (per curiam).

401. United States v. Chadwick, 433 U.S. 1, 7, 11 (1976); Rakas v. Illinois, 439 U.S. 128, 143, 143-44 n.12 (1978); Smith v. Maryland, ___ U.S. ___, 99 S.Ct. 2577, 2581-83 (1979).

402. Note, 93 HARV. L. REV. 1, 180 (1979). "The concept of 'justifiable reliance,' which occupied the central role in the *Katz* majority opinion, appears based on a claim of right by the citizen against governmental intrusion. *See* Amsterdam, *Perspectives*, *supra* note 62, at 385. The introduction of 'reasonable expectation' as the standard produced a subtle shift in perspective, to a claim of right that society would match against the spectrum of legal alternatives and determine to be permissible for the typical citizen. [*See* 1 LAFAVE, *supra* note 340, at 230-31.] With 'legitimate expectation' appears to come a still more pronounced shift: society, through the courts, defines what a citizen may expect from the government." *Id.* at 180 n.72.

403. 439 U.S. 128 (1978); *see* notes 340-84 *supra* and accompanying text.

404. 439 U.S. at 148.

405. *Id.* at 143-44 n.12.

406. Katz v. United States, 389 U.S. 347, 351 n.9 (1967).

privacy formulation of *Katz* supplanted earlier doctrines.[407] *Rakas* indicates not only that the *Katz* privacy test did not completely supersede the trespass standard of prior case law, but it also suggests that a narrow majority of the Court now regards "constitutionally protected areas" as a main ingredient of the *Katz*-based "expectation of privacy" standard.

In the somewhat related decision of *Arkansas v. Sanders*[408] the United States Supreme Court last term found an expectation of privacy deserving of Fourth Amendment protection in personal luggage being transported in an automobile.[409] "Indeed," the Court explained, "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."[410] The Court's rationale is thus consistent with the property-related analysis of the privacy test in *Rakas*. The Court's broader holding in *Sanders* was that the automobile exception to the search warrant requirement does not extend to luggage seized from a legally stopped vehicle even if police officers have probable cause to stop the vehicle and to search its interior.[411] The Court found that the reasons for not requiring a warrant for vehicular stops and searches do not apply to personal luggage taken from the automobile by police.[412]

Since *Katz* rejected "talismanic" analysis of the Fourth Amendment, it would seem that technical considerations of notice, either actual or constructive, of certain government activities would not, by themselves, preclude the existence of a reasonable

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407. *See* Amsterdam, *Perspectives, supra* note 62, at 358. *Katz* itself expressly states that the Fourth Amendment's protections go further than individual privacy and often have nothing to do with privacy at all. 389 U.S. at 350.

408. ___ U.S. ___, 99 S.Ct. 2586 (1979).

409. *Id.* at ___, 99 S.Ct. at 2593.

410. *Id.*

411. *Id.*

412. *Id.* at 2593-94. The Court enumerated two reasons for treating automobiles differently than other property. "First, as the Court has repeatedly recognized, the inherent mobility of automobiles makes it impracticable to obtain a warrant. [citations omitted.] In addition, the configuration, use, and regulation of automobiles may dilute the reasonable expectation of privacy that exists with respect to differently situated property." *Citing* Rakas v. Illinois, 439 U.S. 128 (1978). *Id.* at 2591. *See generally, Criminal Law Survey: Exclusionary Rule*, 40 MONT. L. REV. 132, 142-43 (1979). In Arkansas v. Sanders, ___ U.S. ___, 99 S.Ct. 2586 (1979), the Supreme Court gave two reasons for requiring a warrant to search luggage taken from an automobile. First, once the police have seized the luggage its mobility is in no way affected by the place from which it was taken. The police can then delay the luggage search until they secure a warrant without endangering themselves or without risking the loss of the evidence. Secondly, luggage taken from an automobile stopped on the highway is not attended by any lesser expectation of privacy than luggage taken from any other location. ___ U.S. ___, 99 S.Ct. at 2593-94.

expectation of privacy.[413] Yet, the Court employed just such an "advance-notice" and "assumption of risk" analysis in the recent decision of *Smith v. Maryland*.[414] The Court there held that the telephone company's installation at police request of a pen register to record numbers dialed from the defendant's telephone was not a "search" within the meaning of the Fourth Amendment and hence no warrant was required.[415] It first determined that telephone subscribers harbor no general expectations that the numbers they dial will remain secret.[416] The majority opinion then pronounced that even if the defendant did harbor a subjective expectation of privacy, it would not be one that society is prepared to accept as reasonable,[417] since a person has no "legitimate expectation of privacy in information he voluntarily turns over to third persons."[418] In this regard the Court held that the defendant "assumed the risk" that the phone company would reveal to police the numbers he dialed.[419]

Justice Marshall in dissent attacked the majority's risk analysis of Fourth Amendment rights. He argued that "those who disclose facts to a bank or a phone company for a limited business purpose need not assume that this information will be released to other persons for other reasons"[420] without compliance with the warrant requirement. Implicit in the concept of assumption of risk, he contended, is the concept of choice.[421] Unless one is willing to forgo altogether use of telephone equipment, which has for many become a personal or professional necessity, he cannot avoid the

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413. If notice could defeat judicial recognition of the requisite privacy expectation, the government could erode the Fourth Amendment protection afforded the citizenry by "announcing half-hourly on television that 1984 was being advanced . . ." by a few years and that we would henceforth be subject to significant government surveillance. Amsterdam, *Perspectives, supra* note 62, at 358.

414. ___ U.S. ___, 99 S.Ct. 2577 (1979).

415. *Id.* at ___, 99 S.Ct. at 2580-83.

416. *Id.* at ___, 99 S.Ct. at 2581. According to the majority, all telephone subscribers realize that the phone company has the facilities for making permanent records of the numbers that they dial because they see a list of their long-distance and toll calls on their monthly bills. *Id.* Customers are thus on notice of the company's practice of recording the numbers they dial for business purposes. The Court also found that notice sufficient to defeat any subjective expectation of privacy in dialed numbers is furnished by the "Consumer Information" section of "most" telephone books which informs customers that the phone company " 'can frequently help in identifying to authorities the origin of unwelcome and troublesome calls.' " *Id.*

417. *Id.* at 2582.

418. *Id.*

419. *Id.*

420. *Id.* at ___, 99 S.Ct. at 2585 (Marshall, J., dissenting).

421. *Id.*

risk of surveillance.[422] More fundamentally, making risk analysis "dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections."[423] Justice Marshall's criticism of the majority's rationale is sound and convincing. If the *Katz*-based privacy standard is to become more than a rubber stamp of approval for any forewarned government intrusion into individual interests, and if it is to implement the ostensible protective purpose of the Fourth Amendment, the Court must enunciate a principled method for determining what individual interests warrant a recognized expectation of privacy.[424]

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422. *Id.*

423. *Id.* Law enforcement officials could simply put the public on notice of the risks they assume in communication simply by announcing their intent to randomly monitor samples of first class mail or private telephone conversations. *Id.* In Marshall's view the legitimacy of privacy interest within the meaning of Katz "depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." *Id.*

424. Indeed *Katz* went "to pains to avoid" identifying the privacy interest protected by the Fourth Amendment. Amsterdam, *Perspectives, supra* note 2, at 365; Katz v. United States, 389 U.S. 347, 350-51 (1967). The majority in *Smith* purported to invoke Harlan's two-pronged test of privacy—that the claimant have an actual (subjective) expectation of privacy that society is prepared to accept as reasonable. ___ U.S. ___, 99 S.Ct. at 2580. Yet, the majority neglected to consider the second thoughts which Justice Harlan later expressed about his "reasonable expectation of privacy" formula. Katz v. United States, 389 U.S. 347, 361 (1967) (dissenting opinion). In his dissenting opinion in United States v. White, 401 U.S. 745 (1971), he wrote:

> The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules of customs and values of the past and present.

Id. at 786. In his view, therefore, "talismanic" adherence to the reasonable expectation of privacy test would confine the Fourth Amendment protections to the status quo. He maintained that those protections should not be bound strictly to an existing societal conception of them, but rather should be examined in the light of the type of social order and values that in the Court's judgment are desirable goals. Harlan stated:

> Since it is the task of the law to form and project as well as to mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.

Id.

Lower courts applying the privacy test have reached varying results in advance-notice cases. In People v. Superior Court, 37 Cal. App.3d 836, 112 Cal. Rptr. 764 (1974), police officers in a helicopter discovered stolen automobile parts in the defendant's backyard. The California court apparently concluded that the well-established routine of police aerial patrol in the area put the defendant on notice that he could not, under the circumstances, have a reasonable expectation of privacy. In United States v. Davis, 482 F.2d 893 (8th Cir. 1973), however, the court rejected the government's argument that a defendant who, while undergoing an airport search, was found to have a concealed gun in his carry-on luggage, could not have a justifiable expectation of privacy. The court pointed out that the frequency of airport searches did not negate any expectation of privacy, nor could the government avoid the restrictions of the Fourth Amendment simply by notifying the public of intended

The Supreme Court's holding in *Smith v. Maryland*[425] does not set a clear precedent for the resolution of all advance-notice issues. The Court's discussion was closely tied to the specific facts presented, as is true of advance-notice cases generally. Nevertheless, the decision is bound to give impetus towards judicial negation of privacy interests at least in factual situations sufficiently analogous to that of *Smith* as to justify finding the presence of the three elements which, in the majority's view, were dispositive: (1) advance-notice, whether constructive or actual, (2) voluntary exposure of the asserted privacy interest to third parties, and (3) assumption of risk.

C. *Weighing, Balancing, and Drawing Lines*

1. *Balancing Generally*

There is an obvious tension in Fourth Amendment adjudication between the need for delineating clear and, at times, rigid rules so as to guide law enforcement officials in the conduct of their investigations and the countervailing need for keeping the amendment's contours fluid "so as to guide its extensibility over

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searches.

The interrelationship between expectation and consent has played a central role in another category of advance-notice cases involving "searches" conducted pursuant to regulations, contractual provisions, or posted notices which are specifically brought to the attention of the defendant. *See generally* Note, 76 MICH. L. REV. 154, 159-60, 164-66 (1974). In Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1971), a student had signed a dormitory contract agreeing to allow the university to inspect the premises "under the regular procedure of the University." *Id.* at 438, 272 A.2d at 274-75. Law enforcement officials accompanied by university authorities subsequently raided the student's room and discovered marijuana. The court rejected the prosecution's argument that under the circumstances the defendant could have no reasonable expectation of privacy regarding the room. It held that even if the university had the right to inspect the room for damages and for violations of safety regulations, the student nevertheless was entitled to have a reasonable expectation of privacy regarding the room. *Id.* at 436, 272 A.2d at 273. Furthermore, the court held that the scope of the defendant's consent to inspection of his room was limited to university authorities for limited purposes and did not extend to police searches. *Id.*

In other contexts courts have accepted the argument that an explicit reservation of the right to search defeated Fourth Amendment protection. In Wilson v. Commonwealth, 475 S.W.2d 895 (Ky. 1971), the defendant's knowledge that the police department he worked for kept the keys to all the employee lockers and which asserted a right to search them at any time led the court to uphold the validity of a department's search of the defendant's locker. In State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970), a store employee and a police officer standing over a ventilator in the ceiling of the store's restroom observed homosexual activity. Although excluding the evidence so obtained under *Katz*, the Minnesota court indicated that the store could have prevented a reasonable expectation of privacy by posting warning signs that the premises were subject to surveillance and hence could have validly conducted the same search. *Id.* at 211-12, 177 N.W.2d at 804.

425. ___ U.S. ___, 99 S.Ct. 2577 (1979).

the unexpected."[426] *Katz* is illustrative of judicial recognition for such doctrinal flexibility. In imposing Fourth Amendment restrictions on government use of electronic surveillance and in rejecting the trespass formula as the exclusive measure of Fourth Amendment coverage, the Court's holding had the effect of expanding rather than generally reconstructing the boundaries of the amendment's protection.[427] Due to the rapidity of technological innovation and the " 'frightening paraphenalia which the vaulted marvels of an electronic age may visit upon human society' "[428] courts are hard-pressed to develop coherent principles for defining "searches" and "seizures" not knowing what new modes of government intrusion will emerge from the "Pandora's box" of police practices tomorrow.[429] In short, as Justice Frankfurter once observed, " 'the meaning of the Fourth Amendment must be distilled from contemporaneous history.' "[430]

Two recent decisions of the United States Supreme Court illustrate the Court's concern for both doctrinal definiteness and doctrinal flexibility, and the role of each to implement the protective purpose of the Fourth Amendment. In *Dunaway v. New York*[431] the Court refused to apply an indefinite multifactor balancing test of the reasonableness of police conduct to all seizures not amounting to a technical arrest.[432] Instead it insisted on compliance with the traditional standard of probable cause because only it provided "the relative simplicity and clarity necessary to the implementation of a workable rule."[433] In *Delaware v. Prouse*[434] the Supreme Court held that in order to stop a vehicle and detain its driver for a check of the motorist's license and the car's registration, police had to have a reasonable and articulable suspicion that the driver is unlicensed or that the vehicle is unregistered. The Court thereby imposed Fourth Amendment restrictions on the area of discretionary police license checks—an area which had previously been unregulated and open to abuse. The Court's holdings in these two cases indicate its commitment to a three-tiered model of Fourth Amendment protection: (1) probable cause remains the general prerequisite for serious intrusions on in-

426. Amsterdam, *Perspectives, supra* note 62, at 386.
427. *Id.* at 385.
428. *Id.* at 386, quoting from Silverman v. United States, 365 U.S. 505, 509 (1961).
429. Amsterdam, *Perspectives, supra* note 62, at 387.
430. *Id.* at 396.
431. ___ U.S. ___, 99 S.Ct. 2248 (1979).
432. ___ U.S. ___, 99 S.Ct. at 2257.
433. ___ U.S. ___, 99 S.Ct. at 2257-58.
434. ___ U.S. ___, 99 S.Ct. 1391 (1979).

dividual privacy interests; (2) a narrow group of investigatory detentions, precautionary searches and administrative inspections are, however, permitted upon a showing less stringent than criminal probable cause; (3) other non-search and non-seizure encounters need no Fourth Amendment protection and are governed only by the discretion of public officials. The Court's holdings will be considered against the backdrop of the flexible sliding scale model of Fourth Amendment coverage which the case law of the past decade has intimated.

Traditionally the Fourth Amendment has been treated as a monolith.[435] Of the innumerable gradations of government intrusion into individual interest only those invasions which are sufficiently far-reaching to be judicially labeled a "search" or "seizure" are subject to the extensive restrictions[436] of the amendment. Po-

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435. Amsterdam, *Perspectives, supra* note 62, at 388.

436. *Id.* at 358. According to the language of the Fourth Amendment "searches" and "seizures" are prohibited only if they are unreasonable. *See id.* In United States v. Rabinowitz, 339 U.S. 56 (1950), the United States Supreme Court adopted the so-called "general reasonableness theory" stating that the amendment does not demand a warrant in every case. It condemns only unreasonable searches and seizures—reasonableness to be determined under "the facts and circumstances of each case." *Id.* at 63. Since 1950, however, the Court has held that " 'the definition of reasonableness' turns, at least in part, on the more specific commands of the [Fourth Amendment's] warrant clause." Amsterdam, *Perspectives, supra* note 62, at 358 quoting from United States v. United States Dist. Court, 407 U.S. 297, 315 (1972). Under this so-called warrant theory the Court has consistently invalidated warrantless searches and seizures (*see* Amsterdam, *Perspectives, supra* note 62, at 358) subject only to a few "jealously and carefully drawn exceptions." Jones v. United States, 357 U.S. 493, 499 (1958). The controversy between the warrant-requirement model and the general-reasonableness model is best exemplified by the debate between the majority and the dissent in *United States v. Rabinowitz.*

Even relatively recent majority opinions of the Supreme Court can be found supporting either of these two competing conceptions of the Fourth Amendment. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is well settled . . . that a search conducted without a warrant issued upon probable cause is *'per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' "); *but see* United States v. Edwards, 415 U.S. 800 (1974) (It is "no answer" to say that the police could have obtained a search warrant, for the test is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *Id.* at 807). *Compare* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chimel v. California, 395 U.S. 752, 761 (1969); Schmerber v. California, 384 U.S. 757, 770 (1966); and Trupiano v. United States, 334 U.S. 699, 705 (1948), *with* Cady v. Dombrowski, 413 U.S. 433, 439, 448 (1973); Wyman v. James, 400 U.S. 309, 318 (1971); and United States v. Rabinowitz, 339 U.S. 556, 565-66 (1950) (overruled on other grounds in *Chimel v. California*). *Cf.* A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, I-215 (3rd ed. 1974) ("It is therefore fair to describe the state of Fourth Amendment law as a game professedly played under general-reasonableness rules, actually played for the most part under warrant-theory rules, and subject, from time to time, to the wild card of general reasonableness turning up." *Id.*). *See also* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"*, 8 CRIM. L. BUL. 9 (1972); and Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974) ("The courts have said little of lasting significance about the relationship between the two clauses [the 'warrant' clause and the 'reasonableness' clause]." *Id.* at 48).

lice activities which are not labeled "searches" or "seizures," on the other hand, are not ordinarily circumscribed by either the warrant requirement or the reasonableness standard.[437] To a limited extent the Court has moved away from the monolithic model and towards a sliding-scale approach to Fourth Amendment coverage. Under this approach the protections of the amendment are graduated in proportion to the degree of government intrusion into the interests in "human dignity and privacy."[438] Case law extending back more than a decade supports the proposition that increasing degrees of intrusiveness require increasingly stringent procedures for the establishment of that justification.[439]

To date the Court has applied the balancing approach in three principal areas: (1) in administrative searches, (2) in stop-and-frisk police encounters, and (3) in border searches. In each area the Court requires a showing less particularized than traditional probable cause as the prerequisite for a valid search. The applicable test was articulated in *Camara v. Municipal Court*.[440] The Court there held that administrative warrantless inspection of private residences significantly impinges on interests protected by the Fourth Amendment.[441] Nevertheless the Court refused to require the inspector to establish probable cause to believe that a particular dwelling violated the provisions of the housing code before a warrant could issue. Instead the Court balanced the need to search

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437. Amsterdam, *Perspectives, supra* note 62, at 388.

438. Schmerber v. California, 384 U.S. 757, 769-70 (1966).

439. In Terry v. Ohio, 392 U.S. 1 (1968), for instance, the Court authorized investigative searches, i.e., a brief on-the-street detention accompanied by a frisk or patdown for weapons, upon less than probable cause for arrest. The Court held that a stop-and-frisk was a search and seizure and therefore was subject to Fourth Amendment control, but because it was less intrusive than a full-blown arrest and search incident to an arrest, a lesser degree of justification was required for it. In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that searches which invade the body, specifically the extraction of blood by means of a hypodermic needle, intruded more upon the "interests in human dignity and privacy" than do external bodily searches and demand greater justification. *Id.* at 769-70. Whereas a warrantless external body search may be made incident to an arrest, *Schmerber* states that warrantless searches invading the body wall of the arrestee may only be made when the delay necessary to acquire a warrant would frustrate the purpose of the search. Amsterdam, *Perspectives, supra* note 62, at 390 n.393. The case indicates in dictum that body-breaching searches would be allowable only upon "a clear indication that . . . evidence will be found." 384 U.S. at 770. That statement implies a standard more rigorous than probable cause. Another indication of a graduated approach to the Fourth Amendment is found in the suggestion in David v. Mississippi, 394 U.S. 721 (1969), that detention for finger printing might, under narrowly defined circumstances, be permissible under the Fourth Amendment even without traditional probable cause since it might "constitute a much less serious intrusion upon personal security than other types of police searches and detentions." *Id.* at 727.

440. 387 U.S. 523 (1967).

441. *Id.* at 534.

against the invasion of privacy which the inspection entailed[442] and concluded that administrative searches of private property predicated upon area-wide warrants were not violative of the Fourth Amendment.[443] The area warrant could issue based upon an appraisal of the conditions in the geographical area as a whole, but would not necessarily depend upon the agency's knowledge of the condition in each particular building.[444]

One year later in *Terry v. Ohio*[445] the Court again applied the balancing approach to stop-and-frisk police encounters. The Court balanced the societal interests[446] in crime prevention and detection and in the police officer's safety against the stigma of a public detention and search.[447] It held that police may conduct precautionary searches and seizures upon less than probable cause provided that the police have a reasonable suspicion based on their experience that criminal activity is afoot and that the seized person is armed and dangerous.[448]

The influence of *Terry* is clearly evident in the border search cases, the third category in which the Court has applied the balancing approach to Fourth Amendment issues. Routine border searches have traditionally been considered as an exception to Fourth Amendment protection,[449] the mere fact of crossing the border being sufficient cause for such a search.[450] Nevertheless, some evidence, though less than probable cause, is required for more serious intrusions. A "real suspicion" is required to conduct a

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442. *Id.* at 537. The Court in *Camara* considered such factors as the the long history of public and judicial acceptance of inspection programs, the public's interest in abating dangerous conditions, and the minimal intrusiveness of inspections which are neither personal in nature nor aimed at the discovery of crime. *Id.* at 537-38.

443. *Id.*; See v. Seattle, 387 U.S. 541, 544 (1967).

444. Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

445. 392 U.S. 1 (1968).

446. *Id.* at 22-24. The societal interests mitigating in favor of such stop-and-frisk authority included the public interest in effective crime prevention and detection of crime as well as protection of police and bystanders. *Id.*

447. *Id.* at 24-25. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.*

448. *Id.* at 27, 30. "[I]n justifying the particular facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion." *Id.* at 21.

449. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); United States v. Bowman, 502 F.2d 1215, 1218-19 (5th Cir. 1974); United States v. Warner, 441 F.2d 821, 832 (5th Cir. 1974).

450. *See, e.g.*, United States v. Henderson, 390 F.2d 805, 808 (9th Cir. 1967); United States v. Himmelwright, 551 F.2d 991, 994 (5th Cir. 1977) ("such stops and searches need not be grounded in any articulable and particularized suspicion."). *See also* United States v. Odland, 502 F.2d 148, 151 (1974). *See generally* 3 LAFAVE, *supra* note 340, at 276-81.

strip search,[451] whereas a "clear indication" is necessary for an examination of "body cavities."[452] *United States v. Martinez-Fuerte* held that vehicle stops for questioning at permanent immigration checkpoints require no probable cause, the intrusion being so minimal that no particularized reason need be given to justify it.[453] In *United States v. Brignoni-Ponce* it was held that a brief *Terry*-type stop of a vehicle by a roving border patrol to question the occupants about their citizenship and immigration status and to ask them to explain suspicious circumstances may only be made upon "reasonable suspicion" grounded on "specific articulable facts."[454] The search of a vehicle either at traffic checkpoints removed from the border[455] or by roving patrols[456] requires probable cause or consent. Hence, varying degrees of justification are required in border or near-border situations, with the border search requiring the lowest degree; the roving patrol stop an intermediate standard of "reasonable suspicion," and the search removed from the border the highest degree.[457]

2. *Delaware v. Prouse: Random Vehicular License Checks*

In *Delaware v. Prouse*[458] the Supreme Court last term considered the constitutionality of police spot checks of driver's licenses and vehicle registration on less than probable cause or articulable suspicion.[459] In that case a police officer had stopped the defendant's automobile to conduct a routine driver's license and vehicle registration check. As he approached the vehicle, he smelled marijuana. He then seized the marijuana lying in plain view on the floor of the car and arrested the defendant. During a pretrial suppression hearing the officer testified "that prior to stopping the vehicle he had observed neither traffic nor equipment violations nor any suspicious activity and that he made the stop only in order to

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451. *See, e.g.*, United States v. Henderson, 390 F.2d 805, 808-09 (9th Cir. 1967).

452. *Id.*

453. United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976).

454. United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975). Factors to be considered in determining whether reasonable suspicion exists to justify a stop include: proximity to the border, normal traffic patterns on the highway, the officer's experience with alien traffic, the driver's behavior, erratic or evasive driving, appearance of the occupants, type of vehicle and weight of the load, and recent reports of illegal border crossings. *Id.*

455. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 895-98 (1978); Note, 24 WAYNE L. REV. 1123, 1127 (1978).

456. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

457. *See* Note, ST. MARY'S L. REV. 570, 573-75 (1979).

458. ___ U.S. ___, 99 S.Ct. 1391 (1979).

459. *Id.* at ___, 99 S.Ct. at 1401.

check the driver's license and registration."[460] The Delaware Supreme Court had held that a random stop of an automobile solely for the purpose of a document check was an unreasonable detention of its occupants,[461] indicating that such a police practice violated the Fourth and Fourteenth Amendments to the federal constitution.[462] On certiorari, the United States Supreme Court affirmed, holding that police may not stop an automobile and detain the driver in order to check his driver's license or the car's registration unless the investigating officers have at least an articulable and reasonable suspicion that the vehicle is unregistered.[463]

In considering the constitutionality of such random police stops the Court in *Prouse* applied the balancing test,[464] selectively drawing on principles established in the administrative search cases, the border cases, and in *Terry v. Ohio*. Relying on both border patrol and administrative search cases, the Court emphasized its concern for limiting the amount of discretion afforded an officer in the field.[465] Balancing the countervailing interests the Court held that the state's interest in the promotion of highway safety and in the enforcement of its licensing laws did not clearly outweigh the intrusions upon the physical freedom and psychological security of the motoring public.[466] Furthermore, the Court concluded, the discretionary spot check only marginally advanced the state's interest in roadway safety.[467] In view of its intrusion upon individual privacy, discretionary document checks could not therefore qualify as reasonable law enforcement practices under the Fourth Amendment.[468] By insisting on a "reasonable and articul-

460. *Id.* at ____, 99 S.Ct. at 1394.

461. State v. Prouse, 382 A.2d 1359, 1364 (Del. 1978).

462. *Id.* at 1362.

463. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1401 (1979). Before the Supreme Court's holding in *Prouse*, there was a considerable body of case law indicating that random police stops to examine driver's licenses or vehicle registration even without prior observation of any offense were lawful. *See, e.g.*, United States v. Jenkins, 528 F.2d 713, 715 (10th Cir. 1975); United States v. Cross, 437 F.2d 385, 387 (5th Cir. 1971); Myricks v. United States, 370 F.2d 901, 904 (5th Cir. 1967); *see generally* 3 LAFAVE, *supra* note 340, at 380-86; Note, 14 HOUS. L. REV. 936, 938 (1977); Note, 55 NEB. L. REV. 316, 318 (1976); Note, 25 STAN. L. REV. 865, 870 (1973); Note, 11 ST. MARY'S L. REV. 570, 576 (1979).

464. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1396. The Court stated that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's governmental interests." *Id.*

465. *Id.* at ____, 99 S.Ct. at 1396-97, 1400-01.

466. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1398-99 (1979).

467. *Id.* at ____, 99 S.Ct. at 1399-1400.

468. *Id.* at ____, 99 S.Ct. at 1399. In the Court's view there were less intrusive and more productive mechanisms available for promoting the state's interests, such as checking documents after observed traffic violations, *id.* at ____, 99 S.Ct. at 1399; questioning of all persons at roadblock-type stops, *id.* at ____, 99 S.Ct. at 1401; enforcing annual safety in-

able suspicion" that a driver is unlicensed or that a vehicle is unregistered as a prerequisite for a document check the Court showed a marked predilection for standardizing the various guidelines which permit a police officer to detain an individual on less than probable cause.[469] Prior to its holding in *Prouse* there was an obvious discrepancy between the highly discretionary license check procedures permitted by many state courts[470] and the standard of "reasonable and articulable suspicion" as a prerequisite for conducting short investigatory stops firmly established by the Supreme Court in recent border patrol cases[471] and in *Terry v. Ohio*.[472] In imposing a standard of "reasonable suspicion" the Court in *Prouse*, as in *Terry* and in the border patrol cases, was concerned with preventing pretext investigations and stops based merely on an officer's uninformed suspicion, his "hunches," or a desire to harass.[473]

In bringing the standards governing spot license checks into conformity with analogous investigatory detentions and seizures by law enforcement officers, the Court also rejected Delaware's apparent argument that the Court's administrative inspection cases should be dispositive.[474] The Court rejected the suggestion that the

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spections, *id.* at ____, 99 S.Ct. at 1398-99; and stopping vehicles with observable safety defects, *id.* at ____, 99 S.Ct. at 1399.

469. Note, 11 ST. MARY'S L. REV. 570, 580 (1979).

470. *See generally* 3 LAFAVE, *supra* note 340, at 380-82. Prior to the Supreme Court's holding in Terry v. Ohio, 392 U.S 1 (1968), that the Fourth Amendment governed all seizures of a person and not merely formal "arrests," some state courts had held that the brief detention of a motorist occasioned by a license check did not implicate the Fourth Amendment since no "arrest" had occurred. 3 LAFAVE, *supra* note 340, at 381. Other state courts employed a specious right-privilege distinction whereby holding a driver's license was deemed to be a mere privilege granted solely by statute and subject to statutory restriction and police regulation. *Id.*

471. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (officers on roving patrol may only stop vehicles if they are aware of specific and articulable facts that reasonably warrant suspicion that the vehicle contains illegal aliens); United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (approving fixed-checkpoint stops as involving a lesser subjective intrusion on the motorist than the intrusion occasioned by a stop by a roving patrol).

472. 392 U.S. 1 (1968).

473. *See* Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1400 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973); Terry v. Ohio, 392 U.S. 1, 21 (1968). *But see* United States v. Robinson, 414 U.S. 218, 223 (1973) (license stop search described as valid). The Montana Supreme Court has also invalidated stops based on mere suspicion or conjecture. *See* State v. Lahr, 172 Mont. 32, 560 P.2d 527 (1977); State v. Marshall, ____ Mont. ____, 570 P.2d 909 (1977).

474. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1400-01 (1979). It has been suggested that any assessment of the reasonableness of spot licensing checks requires consideration of the three balancing factors set out in *Camara*: (1) the amount of public interest in the government intrusion, (2) the inability to accomplish the results by following the usual probable cause standard, and (3) the extent of the intrusion into individual privacy as a result of the act. *See* 3 LAFAVE *supra* note 340, at 382-83; Note, 11 ST. MARY'S L. REV. 570,

substantial state regulation of automobiles was comparable to pervasive government regulation of certain industries,[475] participation in which has been held to amount to consent to regulatory restrictions and administrative inspections.[476] As the Court pointed out, there are substantially different factors to be considered in the license check context. In the Court's view, automobile travel is so pervasive and so necessary in our society that government regulation of automobile use should not be found to defeat the reasonable expectation of privacy people sense in traveling by automobile. The Court's rationale is cogent. Private motorists, unlike businessmen in heavily regulated industries, do not subject themselves to the full rigors of administrative inspection merely by using the

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578 (1979). *See also* note 440-44 and accompanying text *supra*. First, the need to enforce motor vehicle safety standards is indisputably at least as compelling as the public need to conduct housing inspections as permitted in *Camara*. *See generally* 3 LAFAVE, *supra* note 340, at 383; Note, 11 ST. MARY'S L. REV. 570, 578 n.70 (1979). Secondly, it has been argued that just as there is no generally effective way of determining the probability of dangerous conditions from outside a building, it is unusual to detect any observable indication of a licensing violation of a moving vehicle and hence that vehicle stops at the discretion of the police are the only effective means of enforcing licensing requirements. 3 LAFAVE, *supra* note 340, at 384. In *Prouse*, however, the Court rejected that argument, presuming instead that unlicensed drivers are less safe than licensed drivers and hence that their more reckless propensities would exhibit themselves. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1399 (1979). Furthermore, the Court assumed that completely random document checks would not effectively deter unlicensed persons from driving. *Id.* With respect to the third criterion, the intrusiveness of a document check is arguably minimal; the detention is normally very brief, no search is involved, and the driver ordinarily may remain seated in his vehicle. *See generally* Note, 11 ST. MARY'S L. REV. 570, 579 (1979). *But see* Pennsylvania v. Mimms, 434 U.S. 106, 121 (1977) (driver ordered to exit vehicle and submit to a "pat-down" for weapons when officer noticed a suspicious bulge under the driver's jacket). Yet the Court in *Prouse* implicitly disagreed with such an evaluation of the intrusiveness of document checks by roving police patrols. It repeatedly stressed the unsettling emotional and psychological effect of such stops. Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1397-98 (1979). By rejecting, in the context of license checks, the notion that participation in a regulated activity implied consent to regulatory inspection, *id.* at ____, 99 S.Ct. at 1400-01, the Court effectively held that private motorists enjoy a greater expectation of privacy in their cars than businessmen enjoy in their regulated business premises. *Id.*

A motorist's Fourth Amendment protection does not disappear simply because he enters an automobile; nor does he lose all expectation of privacy merely because the automobile is subject to government regulation. Logically, therefore, the Court must have considered random license checks to constitute a greater invasion of privacy than is posed by routine administrative searches of pervasively regulated businesses. In addition, regulatory searches are subject tc the requirement of an area warrant whereas discretionary license checks by roving police patrols have traditionally lacked any formalized Fourth Amendment protection.

475. *Id.* at 1400.

476. *See, e.g.*, United States v. Biswell, 406 U.S. 311, 316 (1972) (federal inspection of firearms: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subjected to effective inspection."); Colonade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (federal regulation of liquor).

public highways.[477] For, unlike businessmen in heavily regulated industries, motorists do not derive substantial profits from engaging in the regulated activity. Nor do private motorists, as one commentator has noted, "enjoy the kinds of monopolistic privileges that accompany licenses to sell guns or liquor."[478]

In view of the Court's concern for the "grave danger" of abuse of official discretion,[479] its imposition in *Prouse* of a standard of "reasonable suspicion" provides established criteria by which future confrontations between police and motorists will be examined.[480] Where there is a substantial danger of official abuse of discretion the Court will undoubtedly require a minimum standard of "reasonable suspicion" to justify a contested police practice.[481] This conclusion is borne out by the Supreme Court's recent holding in *Brown v. Texas*.[482] The Court there held that the Fourth Amendment does not permit police to stop and demand identification "from an individual without any specific basis for believing he is involved in criminal activity . . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."[483]

3. *Dunaway v. New York: Detentions for Custodial Interrogation*

In another recent case, *Dunaway v. New York*,[484] the United States Supreme Court declined to adopt a proposed "multifactor balancing test" whereby an officer would "weigh . . . the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter"[485] in judging a detention "indistinguishable from a traditional arrest."[486] In *Dunaway* the Supreme Court held, "[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[487] The Court refused to extend the holding of *Terry v. Ohio*[488] and apply a balancing

477. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973).
478. Note, 24 WAYNE L. REV. 1123, 1134 (1978).
479. Delaware v. Prouse, ___ U.S. ___, 99 S.Ct. 1391, 1400 (1979).
480. *Id.*
481. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968). *See generally* 25 STAN. L. REV. 865, 869 (1973).
482. ___ U.S. ___, 99 S.Ct. 2637 (1979).
483. *Id.* at ___, 99 S.Ct. 2641.
484. ___ U.S. ___, 99 S.Ct. 2248 (1979).
485. *Id.* at ___, 99 S.Ct. at 2256-57 nn.14 & 16.
486. *Id.* at ___, 99 S.Ct. at 2256.
487. *Id.* at ___, 99 S.Ct. at 2258.
488. 392 U.S. 1 (1968).

test to situations other than those already found to fall "far short of the kind of intrusion associated with an arrest."[489] The "reasonable suspicion" standard propounded in *Terry* was found inapplicable where custodial interrogation was involved because the intrusion is then very close to that associated with an arrest.

The elements which the Court found rendered the detention of the defendant for custodial interrogation in *Dunaway* indistinguishable from a traditional arrest were (1) the questioning was not brief, (2) the questioning did not occur where the defendant was found, and (3) the defendant was not free to leave. The fact that he was not told that he was under arrest, was not booked, and would not have had an arrest record if the interrogation had proved fruitless did not lessen the degree of intrusion to the type outlined by *Terry* and its progeny. As the Court pointed out, "[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause."[490] Thus, probable cause was required before the police could engage in custodial interrogation.

Taken together the Supreme Court's holdings in *Dunaway* and *Prouse* indicate an evolving commitment to a three-tiered model of the Fourth Amendment in the area of investigative interrogation. At one end of the scale, probable cause is necessary for lengthy detentions and severe intrusion on individual freedom and privacy. At the opposite end of the scale lies an amorphous body of investigative police activity presumptively free of Fourth Amendment restraint. The decisions in *Dunaway* and *Prouse* illustrate the judicial desire for doctrinal clarity in the interest of providing clear rules for the guidance of police officers and other governmental agents in the field. Indeed, the wholesale adoption of a mul-

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489. Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 2255, 2556 (1979). The Court held:

> The narrow intrusions involved in those cases were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the "long prevailing standards" of probable cause only because these intrusions fell far short of the kind of intrusion associated with an arrest.

Id. at ___, 99 S.Ct. at 2256 [citation omitted].

490. *Id.* at ___, 39 S.Ct. at 2256. The Court stated:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." . . . For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures "are reasonable" only if supported by probable cause.

Id. at ___, 99 S.Ct. at 2257.

tifactor sliding scale model of Fourth Amendment protection might convert the Fourth Amendment "into one immense Rohrschach blot,"[491] rendering an already confused area of the law impossible for police to comprehend. In practice, a generalized sliding scale approach means that appellate courts would defer to the trial court's determination of reasonableness in the first instance and trial courts would defer to the police.[492] The police, in turn, would be without the benefit of any guidelines and, hence, would act upon their own uninformed discretion. While there is a need for the doctrinal flexibility in order to guard against unexpected police practices, there is also a need for some doctrinal definiteness in order to implement the underlying protective purpose of the Fourth Amendment.

VI. Speedy Trial

The Montana Supreme Court decided six decisions on speedy trial issues during the period of this survey.[493] These decisions are not marked by any radical changes in the test first laid down by the United States Supreme Court in *Barker v. Wingo*[494] and subsequently adopted by the Montana Supreme Court. They do, however, fill out details of the test as previously applied and demonstrate that the test is truly a case-by-case balancing test with no particular factor being determinative. Because the Montana decisions do little more than explicate *Barker*, it seems unnecessary to analyze each case individually.

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491. Amsterdam, *Perspectives, supra*, note 62, at 393.

492. *Id.* at 394.

493. State v. Bretz, ___ Mont. ___, 605 P.2d 974, *cert. denied*, ___ U.S. ___, 100 S.Ct. 529 (1979); State v. Harvey, ___ Mont. ___, 603 P.2d 661 (1979); State v. Dess, ___ Mont. ___, 602 P.2d 142 (1979); State v. Freeman, ___ Mont. ___, 599 P.2d 368 (1979); State v. Puzio, ___ Mont. ___, 595 P.2d 1163 (1979); State v. Tiedemann, ___ Mont. ___, 584 P.2d 1284 (1978).

494. 407 U.S. 514 (1972).